No. _____

# In the Supreme Court of the United States

FAMILY FARE, INC., d/b/a GLEN'S MARKET,
*Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the Sixth Circuit Court of Appeals deprive Petitioner of its equal protection rights when it issued an unpublished decision that directly conflicts with and overrules its prior published decisions without granting *en banc* review as required by its own Circuit Rule 206?

2. Did the Sixth Circuit Court of Appeals deprive Petitioner of procedural due process when it issued an unpublished opinion that directly conflicts with and overrules its prior published decisions without granting *en banc* review as required by its own Circuit Rule 206?

3. Did the Sixth Circuit Court of Appeals exceed its authority and exercise non-judicial power in violation of Article III of the Constitution when it issued, against Petitioner, an unpublished opinion that carries no precedential weight?

## RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

*Respondent-Cross-Petitioner*: Family Fare, LLC d/b/a Glen's Market.

*Petitioner-Cross-Respondent*: The National Labor Relations Board.

## RULE 29.6 STATEMENT

Family Fare LLC, d/b/a Glen's Market, is a Michigan corporation and a subsidiary of Spartan Stores Holding, Inc. which is a subsidiary of Spartan Stores, Inc., a publicly owned company incorporated under the laws of the State of Michigan.

There are no other publicly held companies or parent corporations owning 10% or more of Family Fare LLC's stock.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Family Fare, LLC ("Family Fare") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals was issued on November 13, 2006 in Case Numbers 05-2378 and 05-2461 and is available at 205 Fed. App'x 403 (2006). App., *infra,* 3a-21a. The court of appeals decision was unpublished pursuant to Sixth Circuit Rule 206. The Sixth Circuit Court of Appeals also issued orders denying the National Labor Relations Board's motion to publish the court's opinion on December 14, 2006 and denying Family Fare's petition for rehearing with a suggestion for *en banc* review on February 15, 2007. App., *infra*, 1a-2a, 31a.

The decisions of the National Labor Relations Board are reported at 344 NLRB No. 25 (2005) and 344 NLRB No. 100 (2005).

## JURISDICTION

The Sixth Circuit Court of Appeals' decision and opinion was entered on November 13, 2006. The Sixth Circuit denied a timely petition for rehearing on February 15, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

**U.S. Const. amend. XIV, § 1.**

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

**U.S. Const. amend. V.**

"No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

**U.S. Const. art. III, § 1.**

"Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

**29 U.S.C. § 157 (Section 7 of the National Labor Relations Act)**

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . ."

Other relevant provisions of the National Labor Relations Act and NLRB regulations are set forth in the appendix. App., *infra,* 85a-105a.

**6th Cir. R. 206.** (App., *infra*, 106a-07a.)

* * *

(b) Designation for Publication. An opinion or order shall be designated for publication upon the request of any member of the panel.

(c) Published Opinions Binding. Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court *en banc* consideration is required to overrule a published opinion of the court.

## STATEMENT OF THE CASE

The Sixth Circuit Court of Appeals' unpublished decision in this case directly conflicts with and overrules prior published authority of that court in violation of the Circuit's own rule. 6th Cir. R. 206. This unpublished panel decision, coupled with the court's refusal to rehear the case under the correct controlling authority or to grant *en banc* review, has violated Petitioner's constitutional rights to equal protection and procedural due process.

The controlling authority at issue concerns the legal standards to be applied in cases where employers challenge the validity of a union election based on objectionable conduct by statutory supervisors under the National Labor Relations Act ("NLRA").

That the panel's unpublished decision directly conflicted with the Sixth Circuit's binding published standard for determining whether supervisors engaged in objectionable conduct and interfered with employee rights to a free and fair election under the NLRA cannot be disputed:

> **The Sixth Circuit's Published Opinions:** "*The party challenging the election need not introduce proof of actual coercion.*" *Harborside Healthcare, Inc. v. NLRB*, 230 F.3d 206, 210 (6th Cir. 2000) (emphasis in original); *Evergreen Healthcare, Inc. v. NLRB*, 104 F.3d 867, 874 (6th Cir. 1997).
>
> **The Sixth Circuit's Unpublished Opinion:** "[S]ome showing of coercion is required to sustain a finding of objectionable conduct." App., *infra*, 13a.

Like the other federal circuits, the Sixth Circuit has a rule that prohibits a panel of the court from overruling prior published authority without granting *en banc* review. Sixth Circuit Rule 206(c) provides:

> Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court *en banc* consideration is required to overrule a published opinion of the court.
>
> 6th Cir. R. 206(c) (emphasis added).

Under this and similar "no panel overruling" rules, a circuit court has two and only two options: (1) it may follow and apply prior published authority in the case before it (which then permits the court to issue either a published or unpublished decision); or (2) it may alter such prior binding

authority after considering the matter *en banc*.[1] By rule, the court may not issue an unpublished decision that overrules or modifies prior published authority. Doing so, as the Sixth Circuit has done here, violates the litigants' equal protection and due process rights.

Review by this Court is required to protect the parties' constitutional rights and to provide guidance to all Circuit Courts of Appeal that face the problem of panel decisions that circumvent binding published authority in conflict with their own rules.

This case also warrants review because it involves new, critical, and far-reaching principles of federal labor law, and the important rights of employees to vote in a free and fair election under the National Labor Relations Act ("NLRA"). The Sixth Circuit's unpublished decision not only deprives Petitioner of its constitutional rights, but also denies voting employees their fundamental statutory right to participate in a union election free from supervisory misconduct that "reasonably tends" to have a coercive effect on their freedom of choice. 29 U.S.C. § 157; *Harborside Healthcare, Inc.*, 230 F.3d at 210.

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[1] Of course in following prior published authority a panel that takes issue with prior decisions may suggest that the court review the relevant legal principles *en banc*. *E.g.*, *Michigan Family Res., Inc. v. Serv. Employees Int'l Union*, 438 F.3d 653, 658 (6th Cir. 2006) (Sutton J., concurring) (suggesting that the circuit's four-part test for reviewing labor arbitration awards was inconsistent with Supreme Court decisions and that the court should revisit the issue *en banc*), *rev'd en banc*, 475 F.3d 746 (6th Cir. 2007). This approach recognizes the court's binding "no panel overruling" rule and does not violate equal protection or due process rights.

Section 7 of the NLRA protects employees' rights "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing," and their rights "to refrain from . . . such activities." 29 U.S.C. § 157. Congress has expressly identified "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing" as a fundamental policy behind the NLRA, and the Board has a statutory duty to protect employees' rights to select their own representatives in an atmosphere free from objectionable conduct and improper supervisory pressure. *See* 29 U.S.C. § 151; *NLRB v. Superior Prot., Inc.*, 401 F.3d 282, 288 n.8 (5th Cir. 2005), *citing Pan Am. Grain Co.*, 317 NLRB 442, 447 (1995).

Statutory supervisors in this case initiated a union organizing drive at a grocery store, solicited employees to sign union authorization cards, and pressured employees to support the union. Because the Sixth Circuit impermissibly modified the standard for determining whether the supervisors' conduct was sufficiently objectionable to interfere with the employees' Section 7 rights to a free and fair election, the employees were also denied equal protection of the law. The Sixth Circuit has subjected the election here to a legal standard different than the one that applies in every other comparable union election case in the Sixth Circuit.

The NLRB's General Counsel has acknowledged the importance of this case to federal labor policy by filing a motion asking the Sixth Circuit to publish its opinion. App., *infra*, 22a-24a. In that motion, the General Counsel recognized that the court's ruling was a significant change from prior Sixth Circuit decisions, explaining that the panel's unpublished decision "sets a framework for addressing an

issue of considerable importance to the labor bar and provides much-needed guidance on a new approach to what previously [has] been an area of dispute between the Board and [the Sixth Circuit]." App., *infra*, 23a (emphasis added).

**Factual Background**. Family Fare, LLC d/b/a Glen's Market, is a Michigan corporation and a subsidiary of Spartan Stores Holding, Inc. Family Fare operated 56 retail grocery stores in Northern and Western Michigan during the relevant times in question, including the store at issue in this case.

In mid-October 2001, two statutory supervisors from an Oscoda, Michigan Glen's Market engaged in improper pro-union activity by initiating and leading a union organizing drive. App., *infra*, 5a-6a. The supervisors' pro-union activities gave rise to the parties' dispute on whether the secret ballot election at the store was free from coercion and supervisory taint under the NLRA. At issue in the court below was whether the admitted improper conduct of two statutory supervisors, including direct solicitation of union authorization cards from store employees, constituted objectionable conduct that prevented a free and fair election under Section 9 of the NLRA.

Prior to the January 18, 2002 Board election, the Bakery and Deli Managers at the Glen's Market store in Oscoda engaged in improper pro-union conduct which included, *inter alia*, holding meetings at their homes, approaching other employees and asking them to fill out union authorization cards, pressuring other employees to support the union, speaking about the union so frequently in an employee break area that other employees took breaks elsewhere, and visiting employees at their homes to discuss the union without invitation. App., *infra*, 45a-46a; JA 352-58, 365-68, 371-72,

and 400.[2] These supervisors managed approximately 25% of the voting employees, JA 168, 246. Family Fare, LLC has properly maintained throughout this litigation that the evidence of supervisory taint and other inappropriate conduct in the record "reasonably tended" to have a coercive effect on employees' freedom of choice in the election and that a new election is required under controlling legal authority. *Harborside Healthcare, Inc.*, 230 F.3d at 210.

In fact, there is no dispute that both supervisors solicited union authorization cards from employees between October 2001 and the election in January 2002—conduct that the Board has since repeatedly found to be inherently coercive absent mitigating circumstances, and sufficient to require a new election to protect employees' statutory rights to a free and fair election. *E.g.*, *SNE Enters., Inc.*, 348 NLRB No. 69 (2006); *Chinese Daily News*, 344 NLRB No. 132 (2005).

Following a close election (where the outcome would have been different with a change in just four votes), Family Fare filed objections to conduct that improperly affected the election with the Board. JA 115. A hearing officer overruled the objections. JA 167-72.

Family Fare appealed the hearing officer's decision to the NLRB again arguing, *inter alia*, that the managers had engaged in widespread coercive conduct that tainted the employees' free choice and required a new election. JA 174-90. The company also argued that the admitted solicitation of union authorization cards by the two supervisors was, in

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[2] "JA" refers to the Joint Appendix filed with the Sixth Circuit Court of Appeals.

itself, compelling evidence of coercive objectionable conduct requiring a new election. JA 188-89.

On February 22, 2005, the Board overruled the company's objections and certified the union as the exclusive bargaining representative for a stipulated bargaining unit of grocery store employees. App., *infra*, 43a-50a. Thereafter, the NLRB initiated unfair labor practice proceedings based on a charge alleging that the company was refusing to bargain in violation of the Board's February 22, 2005 order. On June 10, 2005, the NLRB issued a second order finding that the company violated Section 8(a)(5) of the NLRA and directed the company to bargain with the union. App., *infra*, 33a-42a. This order was required to trigger jurisdiction by petition to the federal courts of appeal under 29 U.S.C. § 160. *E.g., Harborside Healthcare, Inc.*, 230 F.3d at 208 n.2.

**The Sixth Circuit's Decision**. On review of the Board's petition to enforce its June 10, 2005 order and Family Fare's cross-petition for review, the Sixth Circuit granted enforcement in an unpublished decision issued by a three-judge panel on November 13, 2006. App., *infra*, 3a-21a.

The court's unpublished opinion directly conflicts with prior published authority from the Sixth Circuit, fails to follow controlling decisions from this Court, and exceeds its authority by unnecessarily limiting an NLRB decisional rule that, as stated by the panel, is in direct conflict with a decision of the NLRB.

First, as noted above, the panel decision applied a legal standard for determining objectionable conduct under the NLRA that directly conflicts with prior published Sixth Circuit decisions.

The court incorrectly held that Family Fare was required to make a showing of actual coercion.

- In the panel's words: "some showing of coercion is required to sustain a finding of objectionable conduct" by a statutory supervisor during a union election campaign. App., *infra,* 13a (emphasis added).

- But repeated published Sixth Circuit cases have ruled that "[t]he party challenging the election need not introduce proof of actual coercion." *Harborside Healthcare, Inc. v. NLRB*, 230 F.3d 206, 210 (6th Cir. 2000) (emphasis in original); *Evergreen Healthcare, Inc. v. NLRB*, 104 F.3d 867, 874 (6th Cir. 1997).

The unpublished opinion impermissibly contradicts and modifies the standard previously established in the court's published cases. Thus, it violates the Sixth Circuit's rule that prevents a panel from overruling prior published precedent. 6th Cir. R. 206; *see also Sam & Ali, Inc. v. Ohio Dep't of Liquor Control*, 158 F.3d 397, 405 (6th Cir. 1998) (Krupansky, J., concurring); *United States v. Jones*, 445 F.3d 865, 873 (6th Cir. 2006) (Moore, J., dissenting) ("this panel is not at liberty to contradict the law of this circuit as previously decided by a unanimous panel of this court") (emphasis added).

Second, the panel's decision improperly relied on a speculative and unstated rationale to affirm the Board's decision. It is well settled that a federal court of appeals may not speculate on the Board's unstated or unexplained rationale when reviewing administrative determinations. *NLRB v. Metro. Life Ins., Co.*, 380 U.S. 438, 443-44 (1965); *Comcast Cablevision-Taylor v. NLRB*, 232 F.3d 490, 497 (6th Cir.

2001). Here, the Board assumed supervisory status for the managers but did not analyze *how* the nature or degree of supervisory authority impacted the analysis or conclusion in its published ruling. App., *infra*, 46a-49a. Nevertheless, the Sixth Circuit panel made its own speculative inquiry into the nature and degree of the managers' authority to support its decision, contradicting its own (and this Court's) prior binding precedent. App., *infra*, 16a-17a.

Third, the Sixth Circuit panel altered and failed to apply the correct NLRB rule on union card solicitations. The Board has repeatedly held that solicitation of union authorization cards by supervisors is inherently coercive absent mitigating circumstances. The court's decision, however, held that the NLRB's rule presuming coercion absent mitigating circumstances applies "only where the supervisors at issue possess sufficiently broad and meaningful authority." App., *infra*, 19a.

The court thus altered the Board's new rule on solicitation of union cards by adding a significantly broad and meaningful "level of authority" requirement to the analysis. This new purported requirement is not supported by published Board decisions. In fact, the Sixth Circuit modified the Board's rule despite Family Fare's repeated citation to the Board's decision in *SNE Enterprises, Inc.* where the NLRB rejected a claim by a Regional Director that the coercive nature of union card solicitations was mitigated by a "lack of power to significantly affect the working lives of employees." *SNE Enters., Inc.*, 348 NLRB No. 69, *2 (2006).

The panel below heard oral argument in this case on September 21, 2006, and the Board decided *SNE Enterprises, Inc.* 348 NLRB No. 69 on October 31, 2006. Family Fare immediately brought the Board's new authority to the Sixth

Circuit's attention on November 6, 2006, pursuant to Federal Rule of Appellate Procedure 28(j). App., *infra*, 109a-111a. Yet the panel's decision failed to address or even mention this case. In fact, the panel added a requirement to the Board's rule that contradicts the Board's *SNE* decision. The Sixth Circuit also failed to address this issue in deciding Family Fare's petition for rehearing.

In this respect, the court's decision refuses to defer to the Board's card solicitation rule which does not require broad and meaningful supervisory authority. The court failed to follow a rule which is rational and consistent with the NLRA and again refused to follow prior binding authority. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 364 (1998); *Mid-America Care Found. v. NLRB*, 148 F.3d 638, 643 (6th Cir. 1998).

**Proceedings Following the Decision Below.** Family Fare identified these fundamental defects in its petition for rehearing with a suggestion for rehearing *en banc*. The Sixth Circuit, however, did not grant *en banc* review, denied the petition, and offered no explanation for its obvious departure from prior authority. Instead, the court issued a one-page short form order denying rehearing where it stated that "the issues raised in the petition were fully considered" upon the original submission of the case. App., *infra*, 1a-2a.

The court offered no explanation for its failure to follow its own prior published precedent. Nor did it explain how the panel could have "fully considered" the issues raised by Family Fare in its rehearing petition "upon original submission" when the issues raised in the petition for rehearing were based on the court's errors that were unknown until the panel issued its unpublished decision. It was simply impossible for the panel to have done what it states.

It is also impossible to know how the court would have ruled had it applied the correct legal standards as set forth in prior binding published decisions of the Sixth Circuit. The parties cannot, and are not required to, speculate in this regard. The Court should remand the case for *en banc* review by the Sixth Circuit or for reconsideration under the correct controlling legal authority.

The panel's significant departure from prior published Sixth Circuit law is underscored by the General Counsel's November 27, 2006 motion asking the court to publish its opinion. The General Counsel for the Board recognized that the panel's decision rested on a "new approach" for examining objectionable conduct by pro-union supervisors under the NLRA. General Counsel further acknowledged that the unpublished opinion "sets a framework for addressing an issue of considerable importance to the labor bar and provides much-needed guidance on a new approach to what previously [had] been an area of dispute between the Board and [the Sixth Circuit.]" App., *infra*, 23a (emphasis added).

Courts of appeals in other federal circuits with "no panel overruling" rules will face similar problems with panel decisions that circumvent the doctrine of *stare decisis* as reflected in those binding rules. As explained below, the Sixth Circuit has deprived the litigants in this case of their fundamental constitutional rights. The Court should review this case to protect these fundamental rights and to issue guidance for all Courts of Appeal with similar "no panel overruling" rules.

## REASONS FOR GRANTING THE PETITION

### I. The Sixth Circuit Deprived Petitioner of Equal Protection When It Issued an Unpublished Decision that Applied Legal Standards in Direct Conflict With Those in Prior Published Decisions Without Granting *En Banc* Review.

The Equal Protection Clause of the Constitution "commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The constitutional guarantee of equal protection applies equally to the federal government. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) ("it would be unthinkable that the same Constitution would impose a lesser duty on the federal government"). "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.'" *Skinner v. Okla. ex rel. Williams*, 316 U.S. 535, 541 (1942). Petitioner was denied protection of equal laws when the Sixth Circuit refused to follow its own rule or prior published precedent.

#### A. This Case Involves Fundamental Principles of *Stare Decisis* and "No Panel Overruling" Rules Adopted by All of the Circuit Courts of Appeals.

"*Stare decisis*" is short for *stare decisis et non quieta movere*, which means "stand by the thing decided and do not disturb the calm." Federal courts "have always required a departure from precedent to be supported by some 'special justification.'" *United States v. Int'l Bus. Mach. Corp.*, 517 U.S. 843, 856 (1996), *quoting Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (Souter, J., concurring). In keeping with this

tradition, all federal circuits have enacted or adopted strict "no panel overruling" rules. These rules reflect a strong notion of *stare decisis* and bind panels to prior published rulings unless the circuit court of appeals revisits the issues *en banc*.[3] *See* Amy Coney Barrett, Stare Decisis and Due Process, 74 U. COLO. L. REV. 1011, 1018 and 1044 (2003) (noting the rigidity that comes from "the rule, followed in every circuit, that one panel cannot overrule another" and that these rules "set most circuit law in relative stone"). Such is the case with Sixth Circuit Rule 206(c) which provides that "reported panel opinions are binding on subsequent panels," and *en banc* review "is required to overrule a published opinion of the court." 6th Cir. R. 206(c).

The purpose of Sixth Circuit Rule 206 and other "no panel overruling" rules is to maintain *stare decisis* and promote "fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a

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[3] Some circuits have adopted these so-called "no panel overruling" rules by rule or procedure and others by case law. *See, e.g., Bath Iron Works Corp. v. Dir., Office of Workers' Comp. Programs*, 136 F.3d 34, 40 (1st Cir. 1998); *Woodling v. Garrett Corp.*, 813 F.2d 543, 557 (2d Cir. 1987); *Abdulai v. Ashcroft*, 239 F.3d 543, 553 (3d Cir. 2001); 3d Cir. I.O.P. 9.1; *Norfolk & West. Ry. Co. v. Dir., Office of Worker's Comp. Programs*, 5 F.3d 777, 779 (4th Cir. 1993); 6th Cir. R. 206(c); *Dir., Office of Workers' Comp. Programs v. Peabody Coal Co.*, 554 F.2d 310, 333 (7th Cir. 1977); *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1297 (8th Cir. 1994); *In re Osborne*, 76 F.3d 306, 309 (9th Cir. 1996); *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000); *United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (*en banc*); *Thompson v. Thompson*, 244 F.2d 374, 375 (D.C. Cir. 1957); *LaForte v. Horner*, 833 F.2d 977, 980 (Fed. Cir. 1987).

source of impersonal and reasoned judgments." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970) (emphasis added); *accord McGinley v. Houston*, 361 F.3d 1328, 1331 (11th Cir. 2004) (discussing the "no panel overruling" rule in the Fifth and Eleventh Circuits).

"The United States federal legal system is structured as a common law system," and "[t]his system 'embodies the rule of *stare decisis* that 'courts should not lightly overrule past decisions. . . .'" *McGinley*, 361 F.3d at 1331, *quoting Moragne*, 398 U.S. at 403. "Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law." *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000) (vacated as moot on unrelated grounds), *citing Marbury v. Madison*, 5 U.S. 137, 147 (1803). These declarations "must be applied in subsequent cases to similarly situated parties." *Anastasoff*, 223 F.3d at 900, *citing James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991).

This doctrine of precedent is not simply the common law tradition inherited from England, but it serves the contemporary and vital purpose of ensuring due process by protecting contemporary litigants from arbitrary decisions and preventing the courts from exercising anything other than the judicial power to determine laws, instead of the legislative power to create laws. *See Anastasoff*, 223 F.3d at 901. Thus a system of *stare decisis* is a necessary and vital part of due process and the fair adjudication of claims.

### B. The Sixth Circuit's Unpublished Decision Modified and Overruled Prior Published Legal Standards in Violation of Circuit Rule 206.

There are two factors that the Board and Courts in the Sixth Circuit examine when determining if a supervisor's pro-union conduct upsets the conditions for a free and fair election. This case involves the first step only, i.e. whether the conduct "reasonably tended" to coerce or interfere with the employee's exercise of free choice. In *Harborside Healthcare, Inc. v. NLRB*, 230 F.3d 206, 210 (6th Cir. 2000), the Sixth Circuit examined and settled the law regarding the first factor. It explained:

> An election will be invalidated when the petition demonstrates ~~that~~ "the supervisor's conduct reasonably tended to have such a coercive effect on the employees that it was likely to impair their freedoms of choice in the election." *The party challenging the election need not introduce proof of actual coercion.*

*Id.*, *quoting Evergreen Healthcare, Inc.*, 104 F.3d at 874. The *Harborside* Court remanded the case before it because the Board's decision rested on an incorrect notion that the pro-union conduct had to be threatening and coercive. On remand, the NLRB adopted the Sixth Circuit's approach. *Harborside Healthcare, Inc.*, 343 NLRB 906, 909 (2004) (the first prong of the NLRB's test "mirrors the Sixth Circuit's standard").

The panel, however, ruled that "*some showing* of coercion is required." This ruling openly departed from the settled

Sixth Circuit law quoted above. *Compare* App., *infra*, 13a, *with Evergreen Healthcare*, 104 F.3d at 874.[4]

The panel also contradicted controlling authority from this Court that precludes a federal court of appeals from considering unstated or unexplained agency rationale when reviewing an administrative determination under the substantial evidence standard. *Metro. Life Ins., Co.*, 380 U.S. at 443-44; *Comcast Cablevision-Taylor*, 232 F.3d at 497.

The panel improperly relied on a speculative and unstated rationale to affirm the Board's decision. Although the Board assumed supervisory status for the managers, it did not analyze or explain what role the nature or degree of their supervisory authority actually played in its conclusion. There is no basis to conclude how, or if, the Board evaluated the nature and degree of authority. App., *infra*, 46a-49a. Nevertheless, the Sixth Circuit panel made its own inquiry into the nature and degree of the managers' authority to support its decision, thereby contradicting its own (and this Court's) prior binding precedent. App., *infra*, 16a-17a. In addition, after examining the degree of supervisory authority, the panel compounded its error by adding a requirement to the NLRB's rule on union card solicitations that directly conflicts with the Board's published case in *SNE Enterprises, Inc.*, 348 NLRB No. 69 (2006).

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[4] Rather than applying the established law in the Sixth Circuit and NLRB precedent, the panel cites *Millard Refrigerated Serv.*, 345 NLRB No. 95 (2005) and *Werthan Packaging*, 345 NLRB No. 30 (2005) in support of its improper conclusion. Significantly, neither holds that a showing of actual coercion is required.

### C. The Sixth Circuit's Arbitrary Refusal to Apply Binding Published Authority in the Case Below Violates its Own Rule and Cannot Survive Strict Scrutiny.

Although the general rule is that "legislation [or a local court rule] is presumed to be valid and will be sustained if the classification . . . is rationally related to a legitimate state interest," and thus survives minimum scrutiny, a federal law that impinges upon a right conferred in the Constitution, such as the freedom of speech or fair access to the courts, must survive heightened or "strict" scrutiny. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 (1972) ("[t]he Equal Protection Clause requires the statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives"); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1076 (1991) (holding that the constitutionality of the state bar rule must be "narrowly tailored" and be supported by a "substantial state interest"). Because the Sixth Circuit panel's failure to comply with Rule 206 impacts Petitioner's fundamental rights to equal protection, due process, and a fair adjudication of claims under the Fifth Amendment, its actions in issuing the unpublished decision must survive strict scrutiny.

Here, the unpublished opinion directly contradicts and modifies prior, published Sixth Circuit decisions, subjecting the litigants in this case to a different standard and depriving them of their constitutional right to equal protection under the laws.

Sixth Circuit Rule 206 protects litigants from arbitrary decisions that may deprive individuals of "life, liberty, or property" by requiring an *en banc* review of decisions that reject or overrule prior (published) decisions of the court. As

a result, "[n]o legal authority empowers [a Sixth Circuit] panel to reconsider, reverse, overrule, or modify the legal pronouncements of a prior published opinion of" the circuit, unless "altered by a decision of the United States Supreme Court or by the Sixth Circuit sitting *en banc*." *Sam & Ali, Inc.*, 158 F.3d at 405 (Krupansky, J., concurring); *see also Jones*, 445 F.3d at 873 (Moore, J., dissenting) ("this panel is not at liberty to contradict the law of this circuit as previously decided by a unanimous panel of this court").

The rule provides that only "reported panel opinions are binding on subsequent panels." 6th Cir. R. 206(c). An unreported opinion is *per se* incapable of overruling or modifying a prior published opinion. Thus, an unpublished opinion that directly contradicts a prior published decision simply cannot issue under this rule in the absence of *en banc* review. A major loophole exists, however, when as in this case, a panel issues an unpublished decision that modifies prior controlling published authority in violation of Circuit Rule 206 but refuses to review the case *en banc*. Under these circumstances, a panel of the Sixth Circuit, with or without intent, side-steps the well established system of *stare decisis* and the Sixth Circuit's own procedure for modifying or overruling published decisions.

Here, the Sixth Circuit panel was on clear notice, from both parties, that its opinion altered existing published authority. Family Fare provided notice by filing its petition for rehearing raising these issues, and the General Counsel filed a motion asking the court to publish its decision which adopted a "new approach" to examining objectionable conduct by statutory supervisors. The Sixth Circuit, however, did not modify its opinion to comport with prior precedent or grant *en banc* review. Instead, it has simply allowed its unpublished decision to control the rights of the

parties in this case in violation of Sixth Circuit Rule 206 and Petitioner's constitutional rights.

There is simply no compelling state interest in applying different legal standards to different litigants based on whether their case is published or not. The Sixth Circuit's actions and opinion as issued in this case cannot survive strict scrutiny.

### D. The Sixth Circuit's Arbitrary Refusal to Apply Prior Published Authority is Not Rationally Related to Any Legitimate Government Interest.

Putting aside its impact on fundamental rights, the Sixth Circuit's refusal to follow binding precedent as required by its own rule cannot survive even minimal scrutiny because there is no rational relation to any legitimate government interest. *Romer v. Evans*, 517 U.S. 620, 631-32 (1996).

The Sixth Circuit may not arbitrarily treat a litigant differently than similarly situated parties by issuing an unpublished panel opinion that overrules prior published authority yet escapes *en banc* review in a particular case. By making such a case unpublished, the court avoids its obligation either to expressly describe why it was not required to follow prior published precedent or examine the issue *en banc* before overruling its own prior authority. In other words, the Sixth Circuit can face a situation, determine what the law is, and issue a published opinion affecting the rights of the parties before it and establishing a rule for future litigants. If, however, a subsequent panel overrules or modifies the published opinion in a second unpublished opinion that escapes *en banc* review, the court unequally affects the rights of similarly situated litigants.

When a panel decides not to publish this second opinion in conflict with prior published authority and the decision is not considered *en banc*, the Sixth Circuit deprives the litigants of the very system that it instituted to prevent such arbitrary decision-making. This course of action avoids binding future litigants, thereby cutting off any further review of the court's underground opinion that conflicts with its published cases.

It is constitutionally impermissible for the Sixth Circuit to issue a decision that overrules prior published authority without *en banc* review as required by Rule 206. It treats similarly situated litigants differently without any rational basis. Indeed, it creates a separate and contrary rule for those individuals whose fate is decided in an "unpublished" decision. *Romer*, 517 U.S. at 633 (1996) ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.")

The panel in this case was required either to follow the prior published cases that do not require a party to show actual coercion to establish objectionable conduct warranting a new union election, or to submit the decision for *en banc* review before altering this standard. The court was without authority to enter the opinion as written and improperly refused, when asked in a petition for rehearing, to vacate or modify the decision under the correct controlling standard. App., *infra*, 1a-2a. As a result, the Sixth Circuit violated the Petitioner's constitutional rights to equal protection.

## II. The Sixth Circuit Denied Petitioner Procedural Due Process By Issuing an Unpublished Decision that Directly Conflicts With and Overrules Prior Published Decisions Without Granting *En Banc* Review.

The Court should grant this petition and remand the case to the Sixth Circuit for *en banc* review or rehearing because Petitioner has also been deprived of its right to procedural due process. In fact, the Sixth Circuit deprived Petitioner of the very procedural due process put in place by that court to protect parties from arbitrary decisions and to reinforce the system of *stare decisis*.

The government violates a party's right to procedural due process when it deprives the party of a property or liberty interest without due process of law. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *see also Warren v. City of Athens*, 411 F.3d 697, 708 (6th Cir. 2005). To establish a procedural due process violation, a party must first demonstrate that it "possessed a protected property or liberty interest and was deprived of that interest." *Warren*, 411 F.3d at 708. First Amendment rights are a protected "liberty interest," which cannot be deprived without due process. *Procunier v. Martinez*, 416 U.S. 396, 418-19 (1974) (First Amendment right to uncensored communication was "a liberty interest"), *overruled on different grounds by Thornburg v. Abbot*, 490 U.S. 401, 411-12 (1989).

The second step in the procedural due process analysis is determining whether the deprivation "contravened notions of due process." *Warren*, F.3d at 709. "The determination of what due process requires in a given context depends on a consideration of both the nature of the governmental function involved and the private interests affected." *Mitchell*, 416 U.S. at 624.

### A. Petitioner Possesses a Liberty Interest in not Associating with a Union Improperly Certified under the NLRA.

Here, Petitioner has a liberty interest in its right not to associate with the union at issue in this lawsuit. *See Wooley v. Maynard*, 430 U.S. 705 (1977) (First Amendment rights include the right *not* to speak); *Otto v. Pa. State Educ. Ass'n*, 330 F.3d 125, 128 (3d Cir. 2003) (recognizing an individual employee's First Amendment "freedom not to associate with a labor organization"); *see also Fiske v. Lockheed-Georgia Co.*, 568 F. Supp. 590, 592 (N.D. Ga. 1983) (noting that a private company asserted a "first amendment right not to associate with a union," and rejecting its arguments on unrelated grounds). The Sixth Circuit used an incorrect legal standard that contradicts published authority and deprived Petitioner of its First Amendment right not to associate with the union based on an improper certification of an exclusive bargaining representative for store employees under the NLRA. The Sixth Circuit also impinged on the Section 7 rights of employees at the Glen's Market Store who are entitled to an election procedure free from misconduct that has a reasonable tendency to coerce. The panel's decision not only extinguishes Family Fare's liberty interest but fails to protect the very statutory rights that the NLRA was enacted to protect.

### B. The Sixth Circuit Deprived Petitioner of Due Process by Failing to Follow Prior Published Authority or Granting *En Banc* Review as Required by Circuit Rule 206.

With regard to the second step of the procedural due process analysis, the Sixth Circuit deprived Petitioner of its liberty interest without affording it the protection of the

procedure already in place within the Sixth Circuit Court of Appeals. The "process due" Petitioner included faithful application of Circuit Rule 206 which required the Sixth Circuit to either follow its prior published opinions or grant en banc review. It did neither.

Although the deprivation of an individual's property rights does not ordinarily violate the constitutional guarantee of procedural due process if the individual is afforded notice and a hearing, this lawsuit does not concern an individual's property interest. Thus, the "determination of what due process requires" in this context, "depends on a consideration of both the nature of the governmental function involved and the private interests affected." *Mitchell*, 416 U.S. at 624.

In *Mitchell*, the Petitioner, a debtor that owed the Respondent for the goods at issue, argued that the state sequestration statute violated its right to the uninterrupted possession of its property. To determine whether the sequestration statute afforded sufficient procedural due process, the court looked to the "nature" of the governmental function behind the statute, namely "to protect the legitimate interests of the creditor and debtor." *Id.* The Court then balanced that interest against the "debtor's real interest in uninterrupted possession of the goods," and determined that the sequestration statute provided sufficient due process protections. *Id.* at 625.

Here, the Sixth Circuit stripped Petitioner of its right to the procedural protection afforded by *en banc* review of decisions that overrule, modify or contradict prior, published opinions. 6th Cir. R. 206(c). Applying the same balancing test that this Court used in *Mitchell*, shows that the governmental function behind the court's interest in issuing an unpublished decision cannot outweigh Petitioner's legitimate

constitutional interests in receiving faithful application of the court's own rule.

The governmental function behind permitting courts to issue unpublished opinions appears to be the court's interest in efficiently managing its congested docket and offering parties a quick resolution of disputes. "We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent." *Anastasoff*, 223 F.3d at 904; *see also Hart v. Massanari*, 266 F.3d 1155, 1177 (9th Cir. 2001) (arguing that the Circuit Courts of Appeal must be allowed to hand-pick which cases become precedent, because "few, if any, appellate courts have the resources to write precedential opinions in every case before them").

This interest, however, is irrelevant and not implicated here. To provide Petitioner and other litigants procedural due process, the Sixth Circuit simply had to follow its prior published authority or grant *en banc* review before changing and applying a new legal standard to Petitioner's case. Any efficiency interests in published versus unpublished decisions are not impacted because the court could just as easily have applied the prior published controlling legal standard in its unpublished opinion.

Petitioner was deprived of its First Amendment right not to bargain with the proposed union by a Sixth Circuit panel opinion, which held that, during the administrative hearing below, Petitioner was required to submit evidence of actual coercion when prior published opinions from the same Court have held that no such showing is required. Petitioner has both the First Amendment right not to associate with unions, and a Fifth Amendment due process right to fair adjudication of its claims through the common law system in place within

the United States Federal Courts. Petitioner also has the right to rely on the well settled precedent and published rule of the Sixth Circuit Court of Appeals requiring *en banc* review before the court (including any panel) arbitrarily contradicts or disregards the circuit's own published precedent.

The court cannot violate a litigant's due process rights under these circumstances simply because the Court wishes to issue an unpublished opinion that escapes *en banc* scrutiny. In other words, it cannot sweep an impermissible modification of prior published authority "under the rug" by putting the change or modification in an unpublished decision. Such action, as in this case, violates the court's own procedural rule and denies the litigants due process and equal protection.

## III. The Sixth Circuit Exercised Non-Judicial Power in Violation of Article III When it Arbitrarily Determined that its Decision Would be Non-binding Precedent.

This Court has clear authority to review the constitutionality of a lower court's local rules because the lower court's rule making powers derive from, and are narrowly limited to, the power to manage their "practice" and "conduct . . . their business," as vested in them by Congress and described in the Federal Rules of Appellate Procedure. 28 U.S.C. § 2071(a); Fed. R. App. P. 47(a). The lower courts may not exceed the power vested in them to control the proceedings before them through the adoption of local rules, and certainly may not adopt unconstitutional local rules. *See Frazier v. Heebe*, 482 U.S. 641, 645-46 (1987) (holding that the U.S. Supreme Court "may exercise its inherent supervisory power to ensure that . . . local rules are consistent with the principles of right and justice. . . ." (internal quotations omitted)).

As explained above, the Sixth Circuit's disposition of the case below deprives Petitioner of equal protection and due process. These constitutional violations hold true under the assumption that the Sixth Circuit had the authority under its rules to designate which of its decisions will be published and which will be unpublished -- with no precedential value. There is, however, a split among federal circuits on whether federal courts may constitutionally designate any opinion published or unpublished as having no precedential value.

For instance, in *Anastasoff*, the Eighth Circuit held that a court exceeds the judicial power vested in it by Article III of the Constitution by deciding which opinions should become published, binding precedent and which should not. *Anastasoff*, 223 F.3d at 905. The Ninth Circuit has disagreed. *Hart v. Massanari*, 266 F.3d 1155, 1177 (9th Cir. 2001).

Although the Ninth Circuit, in an opinion written by Judge Kozinski, disagreed with the court in *Anastasoff*, other judges and law review articles which have examined this circuit split, agree that rules, like Sixth Circuit Rule 206, are unconstitutional. *Compare Hart*, 266 F.3d at 1177 *with State v. Uyesgi*, 60 P.3d 843, 879-80 (Hawaii 2002) (Acoba, J. & Ramil, J., concurring); Vincent M. Cox, Freeing Unpublished Opinions From Exile, 44 WASHBURN L.J. 105, 119 (2004); Jon A. Strongman, Unpublished Opinions, Precedent, and the Fifth Amendment, 50 U. KAN. L. REV. 195 (2001). The *Anastasoff* court implicitly held that by hand-picking which cases would bind future parties, the Court of Appeals was exercising legislative, and not judicial power, and thereby violating the separation of powers. *Anastasoff*, 223 F.3d at 905. The unpublished opinion rule "expands the judicial power beyond the limits set by Article III by allowing

us complete discretion to determine which judicial decisions will bind us and which will not." *Id.*

Although the Federal Rules of Appellate Procedure have recently been amended to prohibit any court from limiting a party's right to cite an unpublished opinion, both *Anastasoff* and scholars agree that the problem with rules, such as Sixth Circuit Rule 206, is not one of citation or publication, and thus has not been repaired by the new federal rule. *See* Fed. R. App. P. 32.1. "The question presented here is not whether opinions ought to be published, but whether they ought to have precedential effect whether published or not." *Anastasoff*, 223 F.3d at 904. "Unfortunately, the furor over the new citation rule has overshadowed a more important and divisive issue – whether it is appropriate for appeals courts to designate some (in fact, most) of their decisions as nonprecedential." Scott E. Gant, Missing the Forest For A Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1, 47 B.C. L. REV. 705 (2006).

The Sixth Circuit exceeded its judicial power and violated Article III of the Constitution when it enforced the NLRB order below in an unpublished opinion. This is an additional basis upon which the Court should find that the panel opinion in this lawsuit must be remanded and submitted for *en banc* review or reheard under the correct controlling legal authority.

## CONCLUSION

For the reasons stated above, Petitioner Family Fare LLC respectfully asks that the Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit and to remand the case for the lower court to rehear the case under correct legal standards and

controlling published authority, or consider the case *en banc* before overruling such authority.

Respectfully Submitted,

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## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**Nos. 05-2378/2461**

**[Filed February 15, 2007]**

| | |
|---|---|
| NATIONAL LABOR RELATIONS BOARD, Petitioner, | ) |
| v. | ) |
| FAMILY FARE, INC., DOING BUSINESS AS GLEN'S MARKET, Respondent. | ) |

BEFORE: SILER and CLAY, Circuit Judges; and STAFFORD,* District Judge.

### ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of

* Hon. William H. Stafford, Senior United States District Judge for the Northern District of Florida, sitting by designation.

this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____

Leonard Green, Clerk

## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**Nos. 05-2378 and 05-2461**

**[Filed November 13, 2006]**

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

FAMILY FARE, INC.,
d/b/a GLEN'S MARKET,
Respondent.

## ON APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD

JUDGES: BEFORE: CLAY and SILER, Circuit Judges; and STAFFORD, District Judge.*

* The Honorable William H. Stafford, Jr., United States District Judge for the Northern District of Florida, sitting by designation.

## OPINION

**CLAY, Circuit Judge**. Petitioner, the National Labor Relations Board ("NLRB" or "the Board"), applies to this court seeking enforcement of a Board order which found Respondent, Family Fare, Inc., d/b/a Glen's Market ("Glen's Market"), to be engaging in unfair labor practices in violation of the National Labor Relations Act ("the Act"), 29 U.S.C. §§ 158(a)(1) and (5),[1] by refusing to bargain with a union recently certified as the representative of a unit of Respondent's employees. Respondent cross-petitions requesting that this Court overturn the Board's denial of its objections to the election, as well as the Board's refusal to direct a new election.

For the reasons that follow, this Court **DENIES** Respondent's cross-petition for review, and **GRANTS** the Board's application for enforcement.

## BACKGROUND

### I. Factual History

Respondent operates one of its fifty-six grocery stores in Oscada, Michigan ("Oscada store"). There are three levels of supervisory employees at the store. The top management level

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[1] 29 U.S.C. § 158(a) provides in relevant part:

> it shall be an unfair labor practice for an employer – (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; ... (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

is that of store director, held by Karen Gonsler. The next level consists of assistant store directors.[2] The third level of supervisory employees are the department managers. There are ten departments and corresponding managers in the store: customer service, meat, deli, bakery, produce, grocery, night stock, dairy, general merchandising, and frozen. The department managers conduct bi-annual performance evaluations of the hourly employees working in their departments. The store director then reviews these performance evaluations, using them to determine wage increases.[3]

Vicki Doran, the deli department manager, initiated a union organizing campaign at the Oscada store in mid-October 2001 with the assistance of the bakery department manager, Matt Kovachevich. Respondent expressly opposed the union campaign. The first union meeting was held at Doran's house on October 19, 2001. At that meeting, Doran and others explained the advantages of the union, including higher wages and better benefits. Doran also told the attendees at the

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[2] Although the store had three assistant store directors in November 2001, Petitioner and Respondent agree that the Oscada store employed only one assistant store director as of January 2002, when the election at issue occurred.

[3] The Regional Director primarily relied upon the department managers' involvement in performance evaluations to conclude that they were "supervisors" as defined in the Act. Additionally, the Regional Director found that while department managers have some involvement in scheduling employees, granting leave requests, responding to grievances, and routine direction of employees, they operate "within relatively fixed parameters" and with insufficient discretion to support a finding of supervisory status on those grounds alone. (J.A. at 79-81)

meeting that unionization of the store might result in the termination of the store director, Karen Gonsler.

The record shows that prior to the election, Doran and Kovachevich engaged in prounion activities. In October 2001, Doran approached employee, Gail Davis, asked her to fill out a union card, and gave Davis additional cards to distribute, Davis said that Doran talked to her and other employees in the coffee shop where the employees took their breaks. Davis testified that Doran spoke about the union so frequently that she and other employees wanted to avoid the discussion and took their breaks elsewhere. Doran also gave union authorization cards to dairy manager, Doug Witkovsky, who in turn returned signed cards to Doran. Witkovsky testified that Doran called him at home during the early days of the campaign to encourage him to join the organizing committee and to discuss the union. Another employee, Judy Howey, also testified that Doran called her at home in October to inform her about the organizing campaign, and a week later, Doran visited Howey's home to ask her to sign a union card and to tell her about the benefits of the union.

Carolyn Toppi, store produce manager, testified that Kovachevich asked her how she planned on voting and requested that she stay with the union, but she refused. According to Toppi, Kovachevich stopped speaking to her after she told him she did not support the union. Both Doran and Kovachevich testified that they did engage in union campaign activities. None of the employees who testified at the hearing before the hearing officer worked in Doran or Kovachevich's departments. Moreover, none of the testifying employees who declined to sign union authorization cards reported negative repercussions as a result of their decisions.

During the run-up to the election, Respondent and its parent company, Spartan Stores, Inc. ("Spartan"), issued several letters to employees and held mandatory meetings aimed at discouraging employees from voting for the union. On December 20, 2001, Spartan issued a memo informing employees of the decision to exclude the customer service, meat, deli, bakery, and produce managers from the eligible voting unit. It expressly cautioned that these managers could no longer "[a]ttend union meetings, [i]nterrogate associates regarding union representation, [or m]ake any promises or threats to associates related to union activity." (J.A. at 252)

The Board conducted the secret ballot election on January 18, 2002. There were twenty-eight votes for the union and twenty votes against it. Eight challenged ballots were cast. The union was certified on February 22, 2005, as the exclusive collective bargaining unit of the relevant employees, which included all clerks, cashiers, meat cutters, department specialists, and courtesy clerks. Excluded from representation were the store director, assistant store director, customer services manager, meat manager, deli manager, bakery manager, produce manager, managers in training, seasonal employees, guards and supervisors.

## II. Procedural History

On November 7, 2001, Local 876, United Food and Commercial Workers International Union, AFL-CIO ("the Union"), filed a petition with the NLRB seeking to represent a unit of employees in the Oscada store. On November 26, 2001, prior to the election, an NLRB hearing officer conducted a hearing to consider the supervisory status of seven of Respondent's department managers. Respondent contended that the managers were supervisors within the

meaning of the Act[4], and were therefore ineligible to vote. On December 19, 2001, the Board's Regional Director issued his Decision and Direction of Election, in which he found that five of the managers at issue were in fact supervisors, including the two department managers at issue in this case, deli department manager, Vicki Doran ("Doran"), and bakery manager, Matt Kovachevich ("Kovachevich").

The Union filed a request for review of the Regional Director's decision, which Respondent opposed. The Board issued an order denying the review, but permitted the five managers to vote in the election subject to challenge. Following the election, Respondent filed timely objections, alleging that the prounion activities of Doran and kovachevich prior to the election had interfered with the employees' free choice in the election. On March 8, 2002, the Board issued a notice of hearing to resolve the issues raised by Respondent's objections and referred the matter to a hearing officer for Report and Recommendation.

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[4] The Act defines a "supervisor" as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11).

At the hearing on March 18 and 19, 2002, the parties stipulated, for purposes of resolving the proceeding, that Bob Erwin, whose ballot was challenged, was ineligible to vote in the election and that the challenge to his ballot should be sustained. This rendered the remaining ballots "non-determinative insofar as they [were] insufficient in number to affect the results of the election." (J.A. at 168) The hearing officer recommended overruling Respondent's objections in their entirety, finding that there was "no need to revisit the supervisory issue."[5] (J.A. at 171, 172)

On June 3, 2002, Respondent filed exceptions to the hearing officer's Report and Recommendation challenging, *inter alia,* the hearing officer's conclusions that the supervisory union campaigning was not inherently coercive and did not constitute offerings of rewards. The Board filed its response to Respondent's exceptions on June 10, 2002. Subsequently, on February 22, 2005, the Board issued its Decision and Certification of Representative in which it adopted the hearing officer's recommendation and found that a certification of representative should be issued.

The General Counsel for the Union filed an unfair labor practices complaint before the NLRB on April 5, 2005, alleging that Respondent had violated 29 U.S.C. §§ 158(a)(1) and (5) by refusing the Union's request to bargain. Respondent answered. The Union filed a motion for partial summary judgment on May 5, 2005. On May 9, 2005, the regional office of the NLRB issued an order transferring the

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[5] In analyzing Respondent's objection involving supervisory campaign involvement, the hearing officer relied upon the Regional Director's previous finding that "Doran and Kovachevich are statutory supervisors as defined in the Act." (J.A. at 171.)

proceeding to the Board and a notice to show cause why the motion should not be granted, to which Respondent replied.

On June 10, 2005, the Board found that Respondent's refusal to bargain was an unfair labor practice under §§ 158(a)(1) and (5), and directed Respondent to bargain with the Union. On October 13, 2005, the Board filed an application for enforcement of its order against Respondent[6]. On November 1, 2005, Respondent filed its response and a cross-petition to review the Board's June 10, 2005 order.

## DISCUSSION

### SUBSTANTIAL EVIDENCE ON THE RECORD SUPPORTS THE BOARD'S DECISION TO OVERRULE RESPONDENT'S ELECTION OBJECTIONS IN WHICH RESPONDENT ALLEGED, INTER ALIA, THAT IMPROPER PROUNION SUPERVISORY CONDUCT TAINTED THE ELECTION

#### A. Standard of Review

This Court's scope of review of Board findings is well-established. *Kux Mfg. Co. v. N.L.R.B.*, 890 F.2d 804, 808

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[6] This Court has jurisdiction over this petition for enforcement pursuant to 29 U.S.C. § 160 (e), which provides in relevant part:

> The Board shall have power to petition any court of appeals . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and . . . the court . . . shall have jurisdiction of the proceeding, and of the question determined therein . . . .

(6th Cir. 1989). The Court reviews the Board's factual findings and application of law under the substantial evidence standard[7]. *Id.; N.L.R.B. v. St. Francis Healthcare Ctr.*, 212 F.3d 945, 952 (6th Cir. 2000). "Where there is substantial evidence in the record as a whole to support the Board's conclusions, they may not be disturbed upon appeal." *Kux Mfg. Co.*, 890 F.2d at 808 (citations omitted). "The burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one . . . . An objecting party must show by specific evidence not only that the improper conduct occurred, but also that it interfered with the employees' exercise of free choice . . . ." *Werthan Packaging, Inc.*, 345 N.L.R.B. No. 30, 2005 WL 2094924, at *3 (2005) (citations and quotations omitted). An objecting party cannot satisfy the burden by merely showing that an election "f[e]ll short of perfection." *N.L.R.B. v. Duriron Co.*, 978 F.2d 254, 256 (6th Cir. 1992). "This burden is not met by proof of misconduct, but rather, specific evidence is required, showing not only that unlawful acts occurred, but also that they interfered with the employees' free choice to such an extent that they materially affected the results of the election." *Kux Mfg.*, 890 F.2d at 808 (internal citations and quotations omitted). "The Board has broad discretion to determine whether the circumstances of an election have allowed the employees to exercise free choice in deciding whether to be represented by a union." *Duriron*, 978 F.2d at 256-57.

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[7] The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. 29 U.S.C. § 160(e).

**B. Objectionable Conduct**

Substantial evidence supports the Board's conclusion that Respondent's supervisors did not engage in objectionable prounion conduct sufficient to taint the election process. In *Harborside Healthcare, Inc.*, 343 N.L.R.B. No. 100, 2004 WL 2915828 (2004), the Board clarified the legal standards applicable when an employer challenges the results of an election alleging objectionable prounion conduct. Under *Harborside*, the Board must consider two factors:

> (1) Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election. This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) an examination of the nature, extent, and context of the conduct in question. (2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

*Id.* at *6. According to the Board, "an express promise or threat is not a requirement for finding prounion supervisory conduct objectionable." *Id.* Nevertheless, the *Harborside* inquiry seeks to foreclose conduct – however implicit or subtly framed – that, in the aggregate, pressures employees to support or oppose unions out of fear of retaliation or hope for preferential treatment by the supervisor, *Id.* at *2 ("Whenever a supervisor engages in prounion or antiunion

activities directed at employees he or she supervises, the potential exists for these activities to put pressure on employees, who are unlikely to forget the power the supervisor has over their work life."). Under *Harborside,* objectionable conduct includes both "actual threats" and "implied threats of retaliation." *Id.* at *6. The Board looks to "the conduct and speech of the supervisor" to determine whether, as a whole, it "amount[s] to implicit threats or coercion." *Id.* Nevertheless, some showing of coercion is required to sustain a finding of objectionable conduct. *Compare Millard Refrigerated Servs.*, 345 N.L.R.B. No. 95, 2005 WL 2477120, at *4 (2005) (finding objectionable conduct where several supervisors solicited union cards from employees, including those directly on their crew; one supervisor told employees "if the union does not get in, everybody will probably be fired" and that same supervisor told the group he would "make [their lives] a living hell" if they didn't support the union) *with Werthan Packaging,* 345 N.L.R.B. No. 30, 2005 WL 2094924, at *2 (finding no objectionable conduct where a supervisor approached an employee wearing a prounion button, asked her how she intended to vote and whether she had filled out an authorization card, and told the employee it would be in the best interest of her family to vote 'no').

*Harborside* dealt with the allegedly objectionable prounion conduct of a charge nurse, Robin Thomas ("Thomas"), at a nursing home. 343 N.L.R.B. No. 100, 2004 WL 2915828, at *3. Thomas engaged in intimidating and threatening behavior, including ordering a subordinate employee to attend meetings, threatening that the employee would lose her job if she did not vote for the union because the employee had signed an authorization card, repeatedly harassing the employee about not attending meetings, and threatening the employee two days before the election that her "days here are numbered if

this union doesn't get in, tell your coworkers they need to vote for the union!" *Id.* at *3-4. Thomas also had threatening and intimidating conversations with other employees in which she repeatedly referenced their job security and threatened that they could lose their jobs if they voted against the union. *Id.* at *3. Additionally, Thomas pressured at least one employee into wearing a union pin. *Id.* at *4. The pervasiveness and intensity of the supervisor's interactions with one employee were such that the employee filed a grievance against the supervisor, alleging that the supervisor "continuously harassed her about supporting the Union." *Id.* at *9.

The *Harborside* Board concluded that Thomas' "supervisory prounion conduct . . . was objectionable in that it interfered with the employees' freedom of choice so as to materially affect the election outcome." *Id.* at *2. According to the Board, Thomas's ability to reward and retaliate against employees, coupled with her repeated and confrontational references to job loss, "could reasonably lead [the employees] to believe that she was not merely expressing her personal opinion, but predicting a real prospect that they could lose their jobs." *Id.* at *8. In other words, given Thomas's status, "the employees could reasonably conclude that [she] had the ability to affect their job tenure if the Union lost the election." *Id.*

The Board in *Harborside* further held that "absent mitigating circumstances, supervisory solicitation of an [union] authorization card has an inherent tendency to interfere with the employee's freedom to choose to sign a card or not," and that such supervisory solicitation "may be objectionable." *Id.* at *9. *Harborside* strongly suggests that the Board, in applying this holding, may appropriately consider the extent of the supervisor's power over his

subordinates, and that supervisory solicitation is inherently coercive only where the supervisors at issue possess some minimal quanta of authority and discretion. *Id.* at *10 ("[O]ur concern is that, if the[] people [soliciting] are supervisors, the interference with employee free choice emanates from their supervisory authority . . . ."); *see also id.* (finding supervisory solicitation of authorization cards objectionable in part "because of the power of the supervisor over an employee"). The Board's subsequent application *of Harborside* further supports this proposition.[8] In effect, the inquiry into the nature and extent of supervisory authority underlies the Board's decisions that supervisory solicitation of authorization cards constitutes inherently coercive conduct. Notably, the Board in *Millard Refrigerated Services* distinguished the Board's decision in the instant case on this very basis. 345 N.L.R.B. No. 95, 2005 WL 2477120, at *5 ("[I]n *Glen's Market,* the supervisors' authority was limited, the Board relying solely on participation in the evaluation process to establish supervisory status; whereas here, there was 'overwhelming' evidence that the leads possessed a wide range of supervisory authority . . . ."). Applying *Harborside* and its progeny to the case at hand, this Court concludes that

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[8] *See Millard Refrigerated Services,* 345 N.L.R.B. No. 95, 2005 WL 2477120, at *4 (2005) ("Given the broad authority that the involved supervisors had over the solicited employees, and in the absence of mitigating circumstances, we concluded that, under the first prong *of Harborside,* the supervisors' card solicitation is objectionable."); *Chinese Daily News and Commc'n Workers of America, AFL-CIO,* 344 N.L.R.B. No. 132, 2005 WL 1564871, at *3 (2005) ("We find, based on the nature and extent of Lin's supervisory authority and the nature, extent, and context of his conduct . . . , that Lin's solicitation and collection of authorization cards from the . . . employees whom he supervised was inherently coercive.").

substantial evidence supports the Board's conclusion that the prounion supervisory conduct here did not reasonably tend to interfere with the employees' exercise of free choice and, consequently, does not rise to the level of objectionable.

1. *Whether the Supervisors' Conduct Reasonably Tended to Coerce or Interfere with the Employees' Exercise of Free Choice*

The first *Harborside* factor directs this Court to consider whether the supervisors' conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election. *Harborside,* 343 N.L.R.B. No. 100, 2004 WL 2915828, at *7. Subsumed within this inquiry, this Court must consider both "the nature and degree of supervisory authority possessed" by the individuals at issue and the "nature, extent, and context" of their allegedly objectionable conduct. *Id.* at *6.

a. *Nature and Degree of Supervisory Authority*

In this case, the Board relied on the Regional Director's previous determination that department managers Doran and Kovachevich were statutory supervisors under the Act, finding it unnecessary to further examine the issue. Substantial evidence on the record supports the Regional Director's finding. However, like all department managers at Respondent's store, Doran and Kovachevich were low-level supervisory employees and did not possess significant supervisory authority.

The charge nurse in *Harborside* had broad authority to finally and substantially impact the daily work life of her

subordinates.[9] Unlike the rather sweeping and unchecked supervisory authority reposed in the charge nurse in *Harborside,* the department managers here exercise limited authority. They had little ability to exercise independent judgment; rather, they participated in supervisory tasks subject to the direction and review of the store director and any assistant store directors. For example, the Regional Director found that, while department managers created the initial weekly schedule for employees in their department, the store director reviewed and often modified those schedules. Moreover, while the department managers had some role to play in employee discipline, the store director became heavily involved in deciding whether significant disciplinary action, such as discharge or suspension, was warranted. In their most significant supervisory task – conducting performance evaluations – the department managers' input largely determined employee eligibility for a wage increase.[10] Such evaluations occurred at the third and sixth month for new

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[9] The *Harborside* Board found that she:

> had the authority to initiate disciplinary action[,] . . . direct nurses, assign nurses' schedules, make independent judgments, interview and recommend prospective employees, give the principal input on nursing assistants' evaluations (which affect retention and pay raises), immediately suspend and send home employees, request employees to stay over, and recommend suspension and termination of employees.

*Harborside,* 343 N.L.R.B. No. 100, 2004 WL 2915828, at *4.

[10] The Regional Director concluded on this narrow basis that department managers at Respondent's store are, in fact, statutory supervisors under the Act.

employees, and every six months thereafter. Consequently, Doran and Kovachevich, although properly classed as statutory supervisors, had little authority to impact the daily work lives of employees in their respective departments.

Furthermore, the record establishes that neither Doran nor Kovachevich exercised actual supervisory authority over the employees identified as persons that they directly approached about the union and union authorization cards.[11] Under *Millard,* prounion supervisory conduct need not be targeted toward a direct subordinate to be objectionable where a group of prounion supervisors work together. 345 N.L.R.B. No. 95, 2005 WL 2477120, at *4. However, in this case, the record does not show that Doran and Kovachevich were working together and targeting each other's supervisees. Consequently, this Court agrees with the Board that "the lack of evidence that Doran and Kovachevich had supervisory authority over the employees toward whom their conduct was directed" supports a finding of nonobjectionable conduct in this case. (J.A. at 8)

b. *Nature, Extent, and Context of the Conduct*

Doran and Kovachevich's conduct did not rise to the level of coercive, nor did it interfere with free choice in the election. First, their conduct was not of the frequency and intensity of that found objectionable in *Harborside* and its progeny. *Compare Harborside,* 343 N.L.R.B. No. 100, 2004

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[11] In fact, of the four employees who testified at the hearing on the election challenge, at least three held supervisory positions arguably on par with Doran and Kovachevich: Carolyn Toppi, the produce manager; Judy Howey, the assistant customer service manager; and Doug Witkovsky, the dairy manager.

WL 2915828, at * 9, *with Werthan,* 345 N.L.R.B. No. 30, 2005 WL 2094924, at * 3. Although Doran initiated the union campaign, and spent substantial time trying to recruit people to be involved in organizing and leading the campaign, the record does not reflect that Doran pressured the employees – implicitly or otherwise – to support the union. Even if they spoke frequently about the union, there is no evidence that they were putting undue pressure on other employees to join, or that they were engaging in threatening, harassing, or intimidating behavior.[12] Furthermore, the evidence does not suggest that they promised any rewards or implied that rewards would be forthcoming if employees supported the union.

Second, it cannot be said that Doran and Kovachevich engaged in inherently coercive conduct when they solicited employees to sign authorization cards and gave out stacks of cards for others to distribute. Under *Harborside,* supervisory solicitation of authorization cards constitutes inherently coercive conduct only where the supervisors at issue possess sufficiently broad and meaningful authority. *See Harborside,* 343 N.L.R.B. No. 100, 2004 WL 2915828, at * 10; *see also*

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[12] *Cf. Harborside,* 343 N.L.R.B. No. 100, 2004 WL 2915828, at *8-9 (finding the charge nurse "repeatedly threatened employees with the prospect of job loss" and engaged in "continuous, pervasive, and aggressive campaigning . . . , which included soliciting employees' signatures on authorization cards"); *Millard,* 345 N.L.R.B. No. 95, 2005 WL 2477120, at *4 (noting, among other things, that one supervisor told his subordinates that if they did not vote for the union, he would "make [their lives] a living hell"); *Chinese Daily News,* 344 N.L.R.B. No. 132, 2005 WL 1564871, at *2 (finding the supervisor distributed authorization cards and "personally watched while seven of his supervisees signed" them).

*Millard,* 345 N.L.R.B. No. 95, 2005 WL 2477120, at *4; *Chinese Daily News,* 344 N.L.R.B. No. 132, 2005 WL 1564871, at *3. As the Board's findings suggest, the department managers at Respondent's store exercise only limited supervisory authority within well-defined parameters and, often, subject to the final judgment of the store director. Where statutory supervisors do not actually exercise power over the solicited employee, such solicitation does not rise to the level of inherently coercive conduct. Further, in this case, Respondent's full-scale antiunion campaign and the ultimate exclusion of Doran and Kovachevich from participation in the campaign[13] mitigate any likelihood that the supervisors' solicitation had any impact - however small - on the decision-making process of the solicited employees.

Substantial evidence supports the hearing officer's analysis of the first factor. As stated by the hearing officer, "[w]hile it is clear that there was supervisory involvement in support of the union's organizational drive, there is absolutely no record evidence of supervisory coercion or the offering of rewards by Doran or Kovachevich, or any supervisor." (J.A. at 171) Moreover, while Doran and Kovachevich "may have talked about what the union may be able to do if the employees selected it as their exclusive collective bargaining representative . . . that is nothing more than campaign rhetoric and does not constitute the offering of rewards by the supervisors in exchange for support." (J.A. at 171-72)

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[13] Respondent succeeded in having Doran and Kovachevich, along with certain other managers, excluded from participation in the campaign. Respondent also ensured that all eligible employees were on notice as of December 2001 – prior to the vote – that Doran and Kovachevich could no longer attend union meetings or even discuss the union with non-managerial employees, much less impact the employees' decisions to support or oppose the union.

Although "an express promise or threat is not a requirement for finding prounion supervisory conduct objectionable," *Harborside,* 343 N.L.R.B. No. 100, 2004 WL 2915828, at *6, at a minimum, implied threats or coercion must be shown to establish supervisory misconduct. *Id.* ("Evidence of actual threats are [sic] not required; implied threats of retaliation are sufficient.") (internal citations and quotations omitted). Mere supervisory participation in the initial organizing campaign without more does not suffice. Consequently, substantial evidence supports the Board's finding that Doran and Kovachevich's prounion activity did not impact the employees' free choice in the election.

2. *Whether the Conduct Interfered to the Extent that it Materially Affected the Outcome of the Election*

As to the second *Harborside* factor, the Board did not reach the issue of whether the supervisors' conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election. In fact, the Board found it unnecessary to answer the question since it did not view the supervisor's conduct as coercive or as having interfered with the employees' exercise of free choice in the election. Like the Board, this Court finds it unnecessary to reach the second *Harborside* factor.

## CONCLUSION

Substantial evidence supports the Board's decision to deny Respondent's election objections, and therefore we **DENY** Respondent's cross-petition for review, and **GRANT** the Board's application for enforcement of its June 10, 2005 order directing Respondent to bargain with the union.

## APPENDIX C

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**Nos. 05-2378, 05-2461**
**Board Case No. 7-CA-48457**

**[Filed November 27, 2006]**

| | |
|---|---|
| NATIONAL LABOR RELATIONS BOARD<br>Petitioner | ) |
| v. | ) |
| FAMILY FARE, INC.,<br>d/b/a/GLENN'S MARKET<br>Respondent | ) |

## MOTION OF THE NATIONAL LABOR RELATIONS BOARD FOR PUBLICATION OF UNPUBLISHED OPINION

To the Honorable, the Judges of the United States Court of Appeals for the Sixth Circuit:

The National Labor Relations Board moves for publication of the unpublished opinion in the above-captioned case, which was issued by a panel of the Court (Circuit Judges Clay and Siler, and District Judge Stafford) on November 13, 2006, and shows:

1. The Court's decision enforcing the Board's order rests upon its acceptance of the Board's finding that the Company could not justify its refusal to honor a union election victory on the facts in this case based upon the claim that that victory was tainted by the active participation of low level supervisors in the organizing effort.

2. The circumstances in which the active participation of low level supervisors in an organizing effort may be said to have interfered with employee free choice has long been a point of contention between the Board and this Court. *See Harborside Healthcare, Inc.*, 343 NLRB No. 100, 2004 WL 2915828 (2004) and cases cited at *1 (on remand from 230 F.3d 206 (6th Cir. 2003)). On remand in *Harborside,* the Board formulated a new approach for addressing such issues that took account of this Court's previously expressed concerns and criticisms. *Id.* at *9-11. Subsequent to that decision, the Board issued several published decisions in other cases that fleshed out the Board's new *Harborside* approach. Those ensuing decisions include the representation-case decision that underlies the Board's unfair labor practice finding in this case.

3. The Court's opinion here accepts the Board's *Harborside* approach and synthesizes the Board ensuing *Harborside* decisions. It therefore sets a framework for addressing an issue of considerable importance to the labor bar and provides much-needed guidance on a new approach to what previously been an area of dispute between the Board and this Court. No other circuit has had occasion to address the Board's new *Harborside* approach. We therefore believe that the opinion should be published under the guidelines established by this Court. *See* Sixth Circuit Internal Rules of Operating Procedure 206(a).

WHEREFORE, the National Labor Relations Board respectfully requests that the Court publish its opinion in this case.

/s/
Aileen A. Armstrong
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
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(202) 273-2960

Dated at Washington, D.C.
this 21st day of November 2006

## APPENDIX D

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**Case Nos. 05-2378 AND 05-2461**

**[Filed December 2, 2006]**

| | |
|---|---|
| NATIONAL LABOR RELATIONS BOARD<br>Petitioner, | )<br>) |
| FAMILY FARE, INC.<br>d/b/a Glen's Market<br>Respondent. | )<br>)<br>) |

**APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD AND CROSS-PETITION FOR REVIEW**

**RESPONDENT'S RESPONSE TO THE NLRB'S MOTION "FOR PUBLICATION OF UNPUBLISHED OPINION"**

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## I. INTRODUCTION

Respondent Family Fare, Inc. d/b/a Glen's Market ("Family Fare") received a copy of the General Counsel's "Motion . . for Publication of Unpublished Opinion" by mail on November 27, 2006. The motion asks the Court to publish its November 13, 2006 decision issued in the above-captioned appeals pursuant to Sixth Circuit I.O.P. 206. This is Respondent's written response to the motion permitted by Federal Rule of Appellate Procedure 27. It is filed along with Respondent's "Petition for Rehearing and Rehearing En Banc."

## II. LEGAL ARGUMENT

### A. The Court Should Not Publish the Panel's Decision Without En Banc Review Because it Conflicts With Prior Published Decisions.

The criteria for publication are set forth in Sixth Circuit Rule 206. Subsection 206(c) provides as follows:

> Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published opinion of the court.

As more fully explained in Family Fare's petition for rehearing, the November 13, 2006 unpublished decision conflicts with prior published decisions of the Sixth Circuit. *Harborside Healthcare, Inc. v. NLRB,* 230 F.3d 206, 210 (6th

Cir. 2000); *Evergreen Healthcare, Inc. v. NLRB,* 104 F.3d 867, 874 (6th Cir. 1997). In those prior published decisions, the Court held that the party challenging a union election based on objectionable conduct by prounion supervisors *"need not introduce proof of actual coercion." Harborside,* 230 F.3d at 210 (emphasis added). The panel in this case, however, concluded that *"some showing of coercion is required* to sustain a finding of objectionable conduct" on this basis. (Panel Op. at 9 (emphasis added).) Therefore, publication should *not* occur absent en banc review or rehearing under the correct legal standards. The Court should deny General Counsel's motion.

**B. The Panel Decision Should Not Be Published Because it Contains Several Misapprehensions of Law and Fact that Require Rehearing.**

The Court should also deny the motion to publish because the opinion contains additional errors that support rehearing. These misapprehensions of fact and law are also detailed in Family Fare's petition for rehearing and are summarized below.

1. The panel misapprehended the NLRB's rule that presumes inherent coercion when supervisors solicit union authorization cards. There is no dispute that the supervisors in this case initiated the union organizing campaign, actively supported the union, and solicited union authorization cards. The panel's decision, however, overlooked the fact that their conduct is *inherently coercive absent mitigating circumstances, Harborside Healthcare,* 343 NLRB No. 100, *2 (2004), *and that no such mitigating circumstances were ever presented to or considered by the Board or hearing officer.* The NLRB abused its discretion by failing to apply its own legal standard regarding union card solicitations.

2. The panel misapprehended the NLRB's rule on solicitation of union cards by holding that such conduct "constitutes inherently coercive conduct where the supervisors at issue possess sufficiently broad and meaningful authority." (Panel Op. at 15.) (Emphasis added). This is an incorrect statement of the NLRB's rule. In fact, the NLRB has recently directed a new election based on the inherent coercive effect of supervisory solicitation of union cards *notwithstanding* a finding that statutory supervisors had a lack of power to significantly affect the working lives of employees. *SNE Enterprises, Inc.*, 348 NLRB No. 69 (2006).

3. The panel apparently failed to even consider *SNE Enterprises, Inc.*, 348 NLRB No. 69 (2006). *SNE Enterprises, Inc.* is the Board's most recent pronouncement on the issues relevant to this appeal and clarifies the Board's rule regarding the coercive effect of supervisory solicitations. The NLRB decided this case on October 31, 2006. Family Fare became aware of the new *SNE* decision on November 6, 2006, and informed the Court of its existence that same day. Fed. R. App. P. 28(j).

4. The Board *provided no explanation for how the type and amount of the supervisors' authority factored into its rationale for overruling Family Fare's objections*. (JA at 7-8.) As such, the Court erred in *concluding* that the supervisors were "low-level supervisory employees [who] did not posses significant supervisory authority" to taint the election. *(Panel* Op. at 12, 15.) The Court may not speculate and rely on the Board's unstated or unexplained rationale. *Comcast Cablevision-Taylor v. NLRB,* 232 F.3d 490, 497 (6th Cir. 2001).

5. Finally, the panel did not address Family Fare's request for remand to the Board for additional fact-finding

under the retroactive ruled announced in *Harborside Healthcare, Inc.*, 343 NLRB No. 100 (2004), a rule not in effect at the time the record was created.

### C. Publication is Not Warranted Based on the General Counsel's Own Statements.

Publication of the decision is improper based on the General Counsel's own allegations. General Counsel explains that the panel's decision formulated "a *new approach* for addressing" issues of prounion supervisory objectionable conduct in "what previously [has] been an area of dispute between the Board and [the Sixth Circuit]." Under this view, the decision overrules prior published decisions. This cannot be done without an en banc hearing. On the other hand, if the decision merely represents an application of existing standards announced by the prior cases, there would be no basis to support publication and the Court should not disturb its original decision not to publish.

## III. CONCLUSION

For the reasons stated above and contained in Family Fare's petition for rehearing and suggestion for en banc review, Respondent respectfully requests that the Court deny General Counsel's motion to publish the panel's November 13, 2006 opinion.

Dated: December 1, 2006

MILLER JOHNSON
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## APPENDIX E

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**Case No: 05-2378; 05-2461**

**[Filed December 14, 2006]**

| | |
|---|---|
| NATIONAL LABOR RELATIONS BOARD<br>Petitioner – Cross Respondent | )<br>) |
| v. | ) |
| FAMILY FARE, INC.,<br>doing business as Glen's Market<br>Respondent – Cross Petitioner | )<br>)<br>) |

**ORDER**

BEFORE: SILER, CLAY, and STAFFORD*, District Judge.

Upon consideration of the Board's motion to publish this court's decision filed November 13, 2006,

It is **ORDERED** that the motion is hereby **DENIED.**

* The Honorable William H. Stafford, United States District Judge for the Northern District of Florida, sitting by designation.

**ENTERED BY ORDER OF THE COURT**

/s/
Leonard Green, Clerk

## APPENDIX F

## NATIONAL LABOR RELATIONS BOARD

**Case 7-CA-48457**

**[Filed June 10, 2005]**

**Family Fare, Inc. d/b/a Glen's Market *and* Local 876, United Food and Commercial Workers International Union, AFL-CIO**

## DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on March 29, 2005, the General Counsel issued the complaint on April 5, 2005, alleging that the Respondent has violated Section 8(a)(1) and (5) of the Act by refusing the Union's request to bargain and to provide information following the Union's certification in Case 7-RC-22118. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel,* 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On May 5, 2005, the General Counsel filed a Motion for Partial Summary Judgment. On May 9, 2005, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

**Ruling on Motion for Partial Summary Judgment**

The Respondent admits its refusal to bargain and to furnish information, but contends that the Union's certification is invalid because the Board erred in overruling its objections to the election in the representation proceeding. The Respondent also denies that the information requested by the Union is relevant and necessary to the Union's role as bargaining representative.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. *See Pittsburgh Plate Glass Co. v. NLRB,* 313 U.S. 146, 162 (1941). Accordingly, we grant the General Counsel's Motion for Partial Summary Judgment and will order the Respondent to bargain with the Union.

The General Counsel does not seek summary judgment on the complaint allegations concerning the Union's request for information, but instead the General Counsel states that, as to those allegations, "the Respondent appears to raise issues of fact aside from its challenge to the validity of the Charging

Union's certification." Thus, we find that a hearing is warranted on paragraphs 12, 13, and 14 of the complaint.

On the entire record, the Board makes the following

## FINDINGS OF FACT

## I. JURISDICTION

At all material times, the Respondent, a corporation with its main office at 829 W. Main Street, Gaylord, Michigan, has operated retail grocery stores in the State of Michigan, including a store located at 5463 North Huron Road, Oscoda, Michigan.

During the calendar year 2004, a representative period, the Respondent had gross revenue in excess of $500,000 and purchased goods valued in excess of $50,000, which were shipped to its Oscoda, Michigan facility directly from points located outside the State of Michigan.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Local 876, United Food and Commercial Workers International Union, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### *A. The Certification*

Following the election held on January 18, 2002, the Union was certified on February 22, 2005,[1] as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time clerks, cashiers, meat cutters, department specialists, and courtesy clerks employed by the Respondent at its facility located at 5463 North Huron Road, Oscoda, Michigan; but excluding store director, assistant store directors, customer services manager, meat manager, deli manager, bakery manager, produce manager, managers in training, seasonal employees, and guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

### *B. Refusal to Bargain*

On about March 1 and 18, 2005, the Union, in writing, requested that the Respondent recognize and bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since about March 24, 2005, the Respondent, by letter from its agent Mark Eriks, has failed and refused to recognize and bargain with the Union. We find that this failure and refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(1) and (5) of the Act.

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[1] 344 NLRB No. 25 (2005).

## CONCLUSION OF LAW

By failing and refusing since March 24, 2005, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (5) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.,* 136 NLRB 785 (1962); *Lamar Hotel,* 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.,* 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

## ORDER

The National Labor Relations Board orders that the Respondent, Family Fare, Inc. d/b/a Glen's Market, Oscoda, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 876, United Food and Commercial Workers International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time clerks; cashiers, meat cutters, department specialists, and courtesy clerks employed by the Respondent at its facility located at 5463 North Huron Road, Oscoda, Michigan; but excluding store director, assistant store directors, customer services manager, meat manager, deli manager, bakery manager, produce manager, managers in training, seasonal employees, and guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Oscoda, Michigan, copies of the attached notice

marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 24, 2005.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 10, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with Local 876, United Food and Commercial Workers International Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time clerks, cashiers, meat cutters, department specialists, and courtesy clerks employed by us at our facility located at 5463 North Huron Road, Oscoda, Michigan; but excluding store director, assistant store directors, customer services manager, meat manager, deli manager, bakery manager, produce manager, managers in training, seasonal employees, and guards and supervisors as defined in the Act.

FAMILY FARE, INC., D/B/A GLEN'S MARKET

## APPENDIX G

## NATIONAL LABOR RELATIONS BOARD

**Case 7-RC-22118**

**[Filed February 22, 2005]**

**Family Fare d/b/a Glen's Market *and* Local 876, United Food and Commercial Workers International Union, AFL-CIO**

## DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The National Labor Relations Board has considered objections to an election held on January 18, 2002, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 28 votes cast for and 20 votes cast against the Petitioner, with 8 challenged ballots.[1]

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[1] One of the challenges was resolved by stipulation of the parties before the hearing. Specifically, the parties stipulated that Bob Erwin was not eligible to vote and that the challenge to his ballot should be sustained. As a result, the remaining challenged ballots are not determinative, as the hearing officer found.

The Board has reviewed the record in light of the exceptions and briefs and has decided to adopt the hearing officer's findings and recommendations, to the extent consistent with the rationale set forth in this decision, and finds that a certification of representative should be issued.

## I. BACKGROUND

The Petitioner sought to represent a unit of all of the Employer's clerks, cashiers, meat cutters, and department specialists at the Employer's Oscoda, Michigan grocery store, including the store's department managers. The Employer contended that the department managers are supervisors within the meaning of Section 2(11) of the Act and must be excluded from the unit. The Regional Director issued a Decision and Direction of Election on December 19, 2001,[2] finding that five of the seven department managers were statutory supervisors and thus were ineligible to vote. The Petitioner filed a request for review of this determination with the Board. On February 13, 2002, the Board issued an Order denying review but allowing the five department managers to vote under challenge.

After the election, the Employer filed timely objections, alleging that the prounion activities of Deli Manager Vicki Doran and Bakery Manager Matt Kovachevich prior to the election had interfered with employees' free choice. The hearing officer recommended overruling the Employer's objections in their entirety, finding "no need to revisit the

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[2] All dates are 2001, unless otherwise indicated.

supervisory issue."[3] Rather, he concluded that, even assuming that the department managers were statutory supervisors, their conduct was not objectionable because it was devoid of any threats of reprisal or promises of benefit.[4]

## II. FACTS

The record shows that Deli Manager Doran initiated an organizing campaign at the Employer's Oscoda store in mid-October. Bakery Manager Kovachevich also participated in initiation of the union campaign. It is undisputed that the Employer was expressly opposed to the Union. Prior to and/or also during the first union meeting, which was held at Doran's house on October 19, Doran and others explained the advantages of electing the union, including higher wages and better benefits. Doran also indicated at the meeting and prior to it that the unionization of the Oscoda store might result in the elimination of the store's director, Karen Gonsler.

Also in October, Doran approached employee Gail Davis and asked her to fill out a union card. Doran gave Davis additional union cards and asked her to distribute them to other employees. Employee Doug Witkovsky also received

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[3] As a result of a stipulation between the parties, the ballots of the department managers who had voted subject to challenge proved non-determinative. *See* fn. 1, *supra*.

[4] No exceptions were filed to the hearing officer's finding that it was unnecessary to revisit the Regional Director's ruling on the supervisory status of the department managers. For that reason, we do not review the finding of supervisory status here; rather, we assume the department managers' supervisory status and limit our analysis to the extent of that authority as found by the Regional Director.

union cards from Doran and returned signed cards to her at her request. In addition, Witkovsky testified that Doran called him at home frequently in the early phases of the drive, when he was actively involved in the campaign, to discuss the Union and urged him to join the union organizing committee. Employee Judy Howey also testified that, at some time in October, Doran called her at home to tell her about the organizing campaign and, a week or so later, came to her house to ask her to sign a union card and to explain the benefits of union representation. Neither Davis, Witkovsky, nor Howey worked in Doran's or Kovachevich's departments.

Davis testified that, at the start of the organizing campaign, Doran talked a great deal to her and others about the benefits of union representation, particularly in the employees' breakroom. Witkovsky and Produce Manager Carol Toppi also testified that Kovachevich spoke with them individually about the benefits of unionization and urged them to support the Union.

## III. DISCUSSION

The Employer argues in its exceptions that the hearing officer erred in finding an absence of threats of reprisal or promises of benefit in the conduct of Doran and Kovachevich and also in concluding that their conduct was unobjectionable on that basis. The Employer relies on the Sixth Circuit's decision in *Harborside Healthcare Inc. v. NLRB,* 230 F.3d 206, 212 (6th Cir. 2000), which, the Employer asserts, involved conduct that does not differ significantly from the conduct at issue here.[5]

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[5] In *Harborside,* the court found that the supervisor whose conduct was at issue had threatened nursing assistants in the unit with job

Although we agree with the Employer's argument that threats and promises are not required in order for prounion supervisory conduct to be coercive, as the Board has recently reiterated in *Harborside Healthcare, Inc.*, 343 NLRB No. 100 (2004), we nevertheless find this case to be distinguishable. Thus, one factor in *Harborside* is "the nature and degree of supervisory authority possessed by those who engage in the prounion conduct."[6] Here, the conduct at issue was not

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loss, repeatedly badgered them about attending union meetings and demonstrating support for the union during the critical period, and solicited union authorization cards. The court found that the supervisor had immediate supervisory authority over nursing assistants, including authority to initiate disciplinary action and to provide input on evaluations affecting retention and pay. *Id.* at 211. The court also found supervisory authority over other employees, including the authority to recommend discipline, to direct, to assign schedules, and to recommend prospective hires.

[6] In *Harborside,* the Board explained that whether prounion supervisory conduct upsets the laboratory conditions necessary for a fair election is determined by two factors:

> (1) Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election. This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) an examination of the nature, extent, and context of the conduct in question.
>
> (2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d)

objectionable because of the lack of evidence that Doran and Kovachevich had supervisory authority over the employees toward whom their conduct was directed. We therefore agree with the hearing officer's recommendation to overrule the Employer's objection based on supervisory taint.

The Regional Director conclusively determined that the department managers are statutory supervisors solely because they have authority to evaluate employees, and their independent assessment of an employee's progress determines how the employee will fare under the reward system.[7] This authority extends only to the employees in each manager's department. Because we find no evidence in the record that Doran and Kovachevich directed their prounion activities toward any employee over whom they exercised their supervisory authority, we conclude that their conduct could not reasonably have coerced or interfered with employees' free choice in the election. Cf. *Harborside Healthcare, Inc., supra,* 230 F.3d at 211-212. Accordingly, we adopt the

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the extent to which the conduct became known; and (e) the lingering effect of the conduct. Slip op. at 4.

In assessing the effect of the conduct on the election, the Board may take into account the antiunion statements of higher company officials, and the extent to which they may disavow coercive prounion conduct of supervisors. *Id.* at 5, fn. 12.

[7] The Regional Director concluded that all of the department managers' other responsibilities, with the exception of the authority to discipline employees, were insufficient to establish supervisory status. As to disciplinary authority, the Regional Director concluded that his findings on evaluations made "moot" a discussion of "their authority to issue lower-level discipline." (HOR at 10 fn. 12.) No party requested review of these findings.

hearing officer's recommendation to overrule the Employer's objections and to certify the petitioner's representative status.[8]

## CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the United Food and Commercial Workers International Union, Local 876, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time clerks, cashiers, meat cutters, department specialists, and courtesy clerks employed by the Employer at its facility located at 5463 North Huron Road, Oscoda, Michigan; but excluding store director, assistant store directors, customer services manager, meat manager, deli manager, bakery manager, produce manager, managers in training, seasonal employees, and guards and supervisors as defined in the Act.

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[8] Although she dissented from the majority's decision in *Harborside Healthcare, Inc.*, 343 NLRB No. 100, Member Liebman concurs here in the decision to overrule the Employer's objections and to certify the Petitioner's representative status.

Dated, Washington, D.C. February 22, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX H

**NATIONAL LABOR RELATIONS BOARD**
**SEVENTH REGION**

**Case No. 7-RC-22118**

**[Filed May 21, 2002]**

| | |
|---|---|
| FAMILY FARE d/b/a Glen's Market<br>Employer | ) |
| and | ) |
| LOCAL 876, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO<br>Petitioner | ) |

### HEARING OFFICER'S REPORT AND RECOMMENDATION ON DETERMINATIVE CHALLENGED BALLOTS AND OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION

Upon a petition filed On November 7, 2001, and pursuant to a Decision and Direction of Election issued by the Regional Director on December 19, 2001, an election by secret ballot was conducted on January 18, 2002, among the employees of

the Employer in the following appropriate collective bargaining unit set forth below:

> All full-time and regular part-time clerks, cashiers, meat cutters, department specialists, and courtesy clerks employed by the Employer at its facility located at 5463 North Huron Road, Oscoda, Michigan; but excluding store director, assistant store directors, customer services manager, meat manager, deli manager, bakery manager, produce manager, managers in training, seasonal employees, and guards and supervisors as defined in the Act.

The payroll period for eligibility purposes was the weekly period ending Friday, December 14, 2001.

On February 19, 2002,[1] a copy of the Tally of Ballots, showing the following results, was made available to each of the parties in accordance with the current Rules and Regulations of the Board:

| | |
|---|---|
| Approximate number of eligible voters | 52 |
| Number of void ballots | 0 |
| Number of votes cast for Petitioner | 28 |
| Number of votes cast against participating labor organization | 20 |
| Number of valid votes counted | 48 |
| Number of challenged ballots | 8 |

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[1] The ballots had been impounded at the election held on January 18, 2002, pending the Board's ruling on Petitioner's Request for Review.

Number of valid votes counted plus
challenged ballots . . . . . 56

The challenged ballots were sufficient in number to affect the ultimate results of the election.

On February 26, 2002, the Employer timely filed Objections to Conduct Affecting the Election, a copy of which was served by the Regional Director upon the Petitioner. A copy is attached hereto.

The Regional Director concluded that the determinative challenged ballots and objections raised substantial issues, including credibility resolutions, which could best be resolved at a hearing and a hearing was ordered. The hearing was held before me on March 18 and 19, 2002, at which all parties were present, afforded full opportunity to be heard, present evidence, examine and cross examine witnesses. Post hearing briefs were filed by the parties, and have been carefully reviewed and considered by the undersigned.

## I. THE CHALLENGES

The parties stipulated that for purposes of resolving this proceeding, **Bob Erwin** was ineligible to vote in the election, and the challenge to his ballot should be sustained.

I will so recommend to the Board, which recommendation will result in the remaining ballots being non-determinative insofar as they are insufficient in number to affect the results of the election.

## II. THE OBJECTIONS

### a). *The Record Testimony*

All of the Employer's objections allege improper supervisory support and campaign participation on behalf of the Petitioner during the pre-election campaign. The Employer's witnesses testified as follows:

**Carolyn Toppi,** store produce manager, testified that around October 19, 2001, deli manager[2] Vicki Doran said she would get the union started, and that there would be a union meeting at Doran's home on that date. Toppi attended the October 19 meeting and recalled that at least part of the discussion was focused on what the union could get for the employees, including obtain better wages, benefits, and that Doran said if they got the union in, they could get rid of store director Karen Gonsler. On cross examination, Toppi testified that the Doran discussion about getting rid of Gonsler occurred at the store prior to the October 19 meeting, and not at the meeting itself. Toppi admitted that she knew that Doran, as deli manager, had no authority or power to get rid of Gonsler on her own.

Toppi testified that Doran told her before the union meeting was held at Doran's house that she could get the employees better wages and benefits, but it is clear that Toppi was referring to Doran's comments about what the union could do for the employees. The record is clear that this was,

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[2] In the Decision and Direction of Election, the customer services manager, meat manager, deli manager, bakery manager, and produce manager were excluded on the basis of their supervisory status.

in no way, a promise by Doran, in her capacity as deli manager, to get better wages and benefits for the employees if they supported the union.

On an undetermined date, Matt Kovachevich, bakery manager[3], asked Toppi how she planned on voting, and he asked her to stay with them (in supporting the union). She told him she planned on voting no, and he told her not to tell people that as that may change their minds about the union. He asked her to think about him and his daughter. Subsequently, Toppi felt that Kovachevich didn't talk to her or snubbed her, which resulted in tension.

**Gail Davis,** the office specialist at the store, testified that in October, 2001, she was approached at the store by Doran and Roxanne Summers, the store's frozen manager, regarding the union drive. Doran initially approached her and asked her to fill out a union card which she would later provide to Davis. Subsequently, Doran gave Davis some union cards and asked if she could give them to others. After that, Doran frequently inquired as to whether progress was made in getting cards signed.

Davis testified that Doran talked about the union quite a bit at the start of the drive, and said things like if they wanted to change the way things were in the store, they needed to go union. She said if they wanted to correct the problems in the store, that was the way they needed to do it. She also said if the employees wanted better wages, hours and benefits, they wanted to go union. Also, Doran said, in connection with the

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[3] Kovachevich, in his testimony, referred to himself as a "bakery leader," but the record evidence clearly establishes that his official job title is bakery manager.

union, that they needed to get rid of Karen Gonsler. Davis testified that she was aware that Doran herself did not have the authority to do so herself.

Davis also testified that Doran talked to her and other employees who took their breaks in the coffee shop adjacent to the store bakery area about the union to the point where they wished to avoid the discussions, and took their breaks elsewhere.

**Judy Howey,** assistant customer service manager, testified that Doran called her at her home to tell her that they were organizing the union, and wanted to know if Howey wanted to join. Doran asked if Howey wanted to sign a union card. About a week or so later, Doran accompanied a union agent to her home where she was asked if she would sign a card. Doran and the union agent or agents discussed the benefits of union representation.

Howey also testified that an employee, who she couldn't recall, complained to her that Doran was always talking about the union to people on breaks in the store coffee shop and to avoid that, they took their breaks elsewhere. Howey herself did not witness Doran's coffee shop discussions about the union.

**Doug Witkovsky,** store dairy manager, testified that Doran talked about the union during the organizing drive, and held a couple of union meetings at her home at the start of the drive. Doran asked him if he wanted to be part of some kind of organizing or steering committee, and he stated that that Doran seemed to be the leader of the drive. He got some union authorization cards from Doran, and he returned signed cards to her. Doran called him frequently at his home at the start of the drive, presumably to discuss the union. She also

discouraged Witkovsky from talking to Carol Toppi because she had changed her mind and no longer supported he union. Doran also told him that she heard Toppi had been offered money to stop supporting the union.

Matt Kovachevich told Witkovsky that his support was needed at the union meetings. Both Kovachevich and Doran talked to him about the benefits of union representation, and that Karen Gonsler would probably lose her job as store director by decision of the Employer if the union was successful in its organizing drive. Again, Witkovsky testified that he knew Doran had no authority or power to cause Gonsler to lose her job.

**b).** ***Discussion of the Law and the Facts***

In analyzing these objections involving supervisory campaign involvement, I am assuming that Doran and Kovachevich are statutory supervisors as defined in the Act, as found by the Regional Director in his Decision and Direction of Election in this matter.[4] There is no need to revisit the supervisory issue, but I would note that the limited record evidence adduced at the hearing with respect to the Employer's evaluation process, if anything, strengthens the conclusion that the department managers at issue are statutory supervisors. I am not, however, making a recommendation on that issue as such is unnecessary.

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[4] By Order dated February 13, 2002, the Board stated that the Petitioner's Request for Review raised substantial issues regarding the supervisory status of, among others, Doran and Kovachevich. It concluded that this issue is best resolved by use of the challenge procedure, thus permitting the department managers at issue to vote under challenge. The Petitioner's Request for Review was denied.

As the Board reiterated in ***Terry Machine Co.***, 332 NLRB No. 75 (2000), the prounion activities of statutory supervisors may constitute objectionable conduct warranting setting aside the election in two situations: (1) when the employer takes no stand contrary to the supervisors' prounion activity, thus leading employees to believe that the employer favors the union; or (2) when the supervisors' prounion activity coerces employees into supporting the union out of fear of retaliation by, or rewards from, the supervisors. ***Sutter Roseville Medical Center,*** 324 NLRB 218 (1997), cited with approval in ***Millsboro Nursing & Rehabilitation Center,*** 327 NLRB No. 153 (1999).

Here, the Employer conceded that it took a stand contrary to the supervisors' pro-union activity[5] and record evidence clearly supports that position. Accordingly, this case hinges upon whether the supervisors' prounion activity coerced employees into supporting the union out of fear of retaliation by, or rewards from, the supervisors. While it is clear that there was supervisory involvement in support of the union's organizational drive, there is absolutely no record evidence of supervisory coercion or the offering of rewards by Doran or Kovachevich, or any supervisor. While they may have talked about what the union may be able to do if the employees selected it as their exclusive collective bargaining representative, such as obtain higher wages and improved benefits, or even remove the store director from her position, that is nothing more than campaign rhetoric and does not constitute the offering of rewards by the supervisors in exchange for support.

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[5] The record is clear, and I find, that Doran and Kovachevich engaged in pro-union activities during the organizing drive.

As the Board noted in ***Terry,***[6] solicitation of employees by supervisors on behalf of a union is not objectionable where nothing in the words, deeds or atmosphere of a supervisor's request contains the seeds of potential reprisal, punishment, or intimidation. Similarly, supervisory statements endorsing the union and pointing out the possible benefits of union representation are not inherently coercive and are not objectionable when made without threats of retaliation or reward. Accordingly, assuming that Doran and Kovachevich are statutory supervisors, their actions on behalf of the union were not objectionable.

I will recommend that the objections be overruled in their entirety.

## III. RECOMMENDATION

I recommend that, pursuant to the stipulation of the parties, the challenge to the ballot of **Bob Erwin** be sustained. I further recommend that the Employer's Objections be **overruled** in their entirety, and that a Certification of Representative issue.

PLEASE TAKE NOTICE that within fourteen (14) days of the issuance of this Report, any party may file with the Board, eight (8) copies of exceptions to such report, with supporting brief, if desired, which shall be printed or otherwise legibly duplicated. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof, together with a copy of any brief filed, upon the other parties, including the Regional Director, and simultaneously submit to the Board a statement of such service. (*See* Section

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[6] At page 2, citing ***Sutter.***

102.69(f) as to the procedures and the time limit for filing an answering brief to the exceptions). If no exceptions are filed to the Report, the Board may decide the matter forthwith upon the record or make any other disposition of the case.

Dated at Detroit, Michigan, this 21st day of May, 2002.

/s/

Richard A. Yorke, Hearing Officer
National Labor Relations Board
Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226

## APPENDIX I

## NATIONAL LABOR RELATIONS BOARD

**Case 7-RC-22118**

**[Filed February 13, 2002]**

| | |
|---|---|
| FAMILY FARE, INC. d/b/a | ) |
| GLEN'S MARKET | ) |
| Employer | ) |
| | ) |
| and | ) |
| | ) |
| LOCAL 876, UNITED FOOD AND | ) |
| COMMERCIAL WORKERS INTERNATIONAL | ) |
| UNION, AFL-CIO | ) |
| Petitioner | ) |
| | ) |

## ORDER

Petitioner's Request for Review of the Regional Director's Decision and Direction of Election raises substantial issues with respect to the supervisory status of Customer Services Manager Mary Pratt, Meat Manager Chuck Burnett, Deli Manager Vicki Doran, Bakery Manager Matt Kovachevich, and Produce Manager Carol Toppi. The Board concludes, however, that this issue is best resolved by use of the Board's challenge procedure. Accordingly, the Regional Director's Decision is amended to permit the above-named department

managers to vote under challenge and the Petitioner's Request for Review is denied.

WILMA B. LIEBMAN, MEMBER
WILLIAM B. COWEN, MEMBER
MICHAEL J. BARTLETT, MEMBER

Dated, Washington, D.C., February 13, 2002

## APPENDIX J

## NATIONAL LABOR RELATIONS BOARD
## SEVENTH REGION

**Case 7-RC-22118**

**[Filed December 19, 2001]**

| | |
|---|---|
| FAMILY FARE, INC. | ) |
| d/b/a GLEN'S MARKET[1] | ) |
| Employer | ) |
| | ) |
| and | ) |
| | ) |
| LOCAL 876, UNITED FOOD AND | ) |
| COMMERCIAL WORKERS | ) |
| INTERNATIONAL UNION, AFL-CIO | ) |
| Petitioner | ) |
| | ) |

### DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

[1] The Employer's name appears as corrected at the hearing.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:[2]

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The Employer operates 56 retail grocery stores belonging to the Spartan Store network in northern and western Michigan. The facility at issue is in Oscoda. The parties stipulated to the appropriateness of a wall-to-wall unit excluding supervisors, managers in training, seasonal employees, and guards. The question for resolution is the eligibility of seven department managers – Customer Services Manager Mary Pratt, Grocery Manager Jay McGuire, Meat Manager Chuck Burnett, Deli Manager Vicki Doran, Bakery Manager Matt Kovachevich, Produce Manager Carol Toppi,

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[2] Both parties submitted briefs, which were carefully considered.

and the night stock manager, a position currently unfilled. The Employer contends, contrary to the Petitioner, that these individuals are statutory supervisors and therefore ineligible to vote.

The Oscoda store is headed by Store Director Karen Gonzler. Assistant Store Directors Mark Kovachevich, John Terbrack, and Mark Crooks report directly to Gonzler, as does Customer Services Manager Mary Pratt.[3] All other department managers report to one of the three assistant store directors.[4] Store Director Gonzler answers to Spartan Regional District Manager Richard Creuger and frequently consults with Spartan Regional Human Resources Manager Keith Hansen.

There are about 57 undisputed bargaining unit employees. Customer services, handling what is known as the front end of the store, is by far the largest department, employing 31 workers in such positions as cashier and service clerk (i.e.,

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[3] The parties stipulated, and I concur, that Gonzler, Mark Kovachevich, Terbrack, and Crooks are supervisors within the meaning of Section 2(11) of the Act by virtue of their authority to hire, discipline, and reward employees. Based on the evidence that the dairy, frozen food, and general merchandise departments have no employees, and the lack of evidence that the managers of those departments possess supervisory authority, I accept the parties' further stipulation that Dairy Manager Doug Witkovsky, Frozen Manager Roxanne Somers, and General Merchandise Manager Joann Smithy are employees encompassed by the stipulated unit.

[4] Assistant Store Director Mark Kovachevich oversees grocery and night stock; John Terbrack heads dairy, frozen foods, meat, and general merchandise; and Mark Crooks supervises deli, bakery, and produce.

bagger). The remaining departments have much smaller staffs: night stock and deli (seven employees each); meat and bakery (five each); produce and grocery (one each).

Department managers are responsible for the smooth operation of their respective departments. They place product orders, decide which products to mark down when, oversee and schedule their staff, perform inventories, and prepare records of expenses and sales. The record does not address what percentage of their time is devoted to manual labor, but suggests that they perform such work as needed.

Department managers meet weekly with Store Director Gonzler to review sales, professional shopping reports, advertising, and other concerns. At this meeting, Gonzler gives most department managers an allotted number of labor hours to be distributed among the department's staff. A department manager's request for additional hours is usually granted. The department managers then devise a weekly schedule for their employees.[5] They are guided by the caveat that no employee may be scheduled for overtime without approval of upper management. The schedules are submitted for review to the store director, who, according to one department manager, modifies them 25 to 50 percent of the time.

Employees may obtain changes in their assigned schedule by submitting a time-off request form to the department manager, whose signature on the form constitutes final approval. An employee handbook states at section 2.0 that granting a schedule change or special time off is based upon

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[5] The exceptions are the grocery and night stock managers, whose workers are scheduled by an assistant store director.

the nature or purpose of the application, the employee's previous attendance history, how often the employee makes such requests, and how far in advance the request is made. Although the handbook thus implies that time-off requests are subjected to careful weighing, the store director testified that department managers grant 99 percent of them. Employees are entitled to amounts of paid vacation based upon seniority as established by corporate human resources personnel. There is no record evidence of what rules, if any, department managers must follow when scheduling employees' accrued vacation times.

Absent employees are required to notify their department manager or higher management. Department managers have a duty to report incidents of "no-call-no-show," two consecutive days of which is automatically treated as a voluntary quit. There was testimony that a department manager might plead for special waiver in the case of a senior, valued employee. However, no evidence was adduced that the Employer has informed department managers of this possibility or that any department manager has explored it. Official attendance records are maintained not by department managers but by the store director, assistant store directors, and payroll personnel.[6]

The Employer presented testimony that department managers may approve overtime when an emergency arises. No examples were adduced. A department manager testified that in exigent circumstances, either people in his department agree to work harder, or he invites staff to stay later or arrive earlier. There is no record evidence as to whether department

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[6] The record is silent as to the location of the Oscoda store's payroll personnel.

managers merely request or have authority to compel employees to work solicited overtime.

Department managers may accommodate each other by collaboratively effecting temporary inter-department transfers. No further approval is required for these consensual transfers. There is evidence that the store director may unilaterally mandate a temporary transfer, but none as to whether department managers may also do so.

The Employer uses a progressive disciplinary system ending in discharge for "just cause." Repeated minor offenses move through the stages of counseling, verbal prompter, written prompter, decision-making day,[7] and suspension. Discipline for serious infractions may bypass these steps. The employee handbook contains illustrative, not exhaustive, lists of what the Employer considers minor and major violations. It also explicitly quantifies what constitutes "excessive" absenteeism or tardiness. The Employer uses a form called Positive Reinforcement Memo that calls for a narrative description and a check mark designating the level of punishment, from counseling through suspension, being issued. The Positive Reinforcement Memo has signature lines for the store director, the disciplined employee, and a witness. A different form, containing lines for the same three signatories, is prepared in the case of employment separation.

Department managers encountering disciplinary problems often report them to the store director. When discipline does not involve time off, the department manager may also

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[7] A decision-making day is a paid day off to enable the employee to either contemplate and correct his performance problem or resign.

prepare a Positive Reinforcement Memo. No evidence was presented as to how often, if ever, lower-level discipline originated by department managers is countermanded by higher authority. The Employer introduced five Positive Reinforcement Memos in the counseling and prompter categories, citing failure to check the identification card of a customer purchasing alcohol, retail fraud, no-call-no-show, rudeness to a customer, and failure to supply a doctor's note to support an absence. Most of these reprimands were prepared by the department managers, whose names appeared on the witness lines.[8] Several of the memos warned that the next disciplinary step would be a decision-making day. The recent ones were approved for issuance as reflected by the signatures on the store director's line.

When time off or job loss is being considered, a department manager may not act unilaterally but instead brings the problem to the store director's attention. The store director investigates the situation by conferring with the employee. Before issuing discipline, the store director also consults with a corporate human resources manager in cases of suspension and with the corporate regional district manager in cases of discharge. Two discharge recommendations made by Customer Services Manager Mary Pratt resulted in dismissals. The percentage, if any, of unapproved discharge recommendations by Pratt and other disputed managers was not disclosed.

Job interviews for unit employees are conducted by assistant store directors, who, it appears, also make the hiring

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[8] One particular memo shows Customer Services Manager Mary Pratt's signature as witness, but it is plain by comparing styles of handwriting that she did not prepare it. (Employer Exhibit 40)

decisions. A department manager may attend an interview to offer assessment of the applicant's skills. Scant evidence was adduced concerning department managers' hiring recommendations. Customer Services Manager Mary Pratt "pre-screens" about 90 percent of the written job application forms, as does Grocery Manager Jay McGuire to a limited extent.[9] Pre-screening is said to result in a winnowing of the applicant pool. However, the record fails to indicate the criteria by which applications are rejected at the pre-screening stage, other than ascertaining that the application form has been completed. Department managers have no input into the staffing levels of their respective departments.

Five of the seven disputed department managers evaluate new employees at three and six months, and then every six months thereafter. The exceptions are the grocery and night stock managers, whose employees are evaluated by assistant store directors. The evaluation form elicits a rating of 0 through 10 in 24 categories of job performance and personal skills. It also calls for a narrative. The individual ratings are averaged, and an overall rating of unacceptable, poor, average/good, very good, or excellent is assigned. Each of the five overall rating groups corresponds to either wage stasis or a wage increase in an amount determined by corporate human resources officials. The exact raise associated with a given rating group may not be known to the department manager at the time he prepares the evaluation. Once human resources arrives at a standard formula, no factor other than the overall

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[9] The Employer states in its brief that Pratt's percentage is 50, but the transcript says 90. (Tr 167) Neither party has moved to correct the transcript. It is suggested that McGuire's pre-screening 25 to 40 applications yearly does not match Pratt's role in this regard. This is difficult to assess because the record does not include the total number of applications submitted yearly.

rating assigned by the department manager normally determines an employee's eligibility for a six-month raise or its size. The only exception is when the store director modifies an evaluation, a rare event estimated to occur one percent of the time.[10]

Infrequently, an employee may receive an unscheduled merit increase independent of the evaluation process. There is no signature line for the department manager on the current Personnel Action Request form used to effect this kind of raise. The record contains evidence of only one such raise. It was granted this year to an employee who made the request on his own to Store Director Gonzler, who notified Meat Manager Chuck Burnett before making the final decision herself. Two years earlier, Burnett had recommended to no avail that the raise be given.

The Employer's human resources department determines and adjusts wage ranges for each job classification. There is no evidence that department managers have a role in either formulating the range or selecting a specific starting wage within the range for new hires. Promotions to the jobs of seafood specialist and office specialist have occurred following endorsement by, respectively, the meat and customer service department managers. Department managers also make recommendations regarding assistant department manager jobs. The Employer predicts that such a promotion

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[10] The foregoing evidence regarding evaluations and concomitant wage increases was uncontradicted. The record does not reveal, however, any details about the size of raises. Nor does it shed light on whether unacceptable and poor ratings always mean the denial of a raise, as implied by one exhibit in which the employee was rated "poor" and the department manager's narrative stated that a raise was being denied.

will take place in the future in the deli department. The record is barren of evidence, however, as to what weight is given to the department managers' recommendations and whether promotion candidates are independently evaluated or interviewed by higher management.

Department managers give daily task instructions to the employees in their charge. Although Store Director Gonzler testified that department managers' instructions vary from day to day, she did not explain how or why, or state what latitude department managers may have. The only concrete example of work direction introduced at the hearing was Grocery Manager Jay McGuire's written instructions to the night crew to, inter alia, run back stock, straighten the back room, and tag pallets.[11]

The employee handbook sets forth an in-house grievance system called Fair Treatment Procedure. Appeal to the department manager is the initial stage. If an employee remains aggrieved, he presents the problem sequentially to the store director, regional district manager, and human resources vice president. There is no record evidence about use of the procedure.

All undisputed unit employees are paid hourly and punch a time clock. The department managers in bakery, deli, grocery, meat, and customer services are salaried, although they have the option to be paid hourly. Their compensation, if converted to an hourly rate, exceeds that of their respective

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[11] In cross examination, Gonzler agreed to opposing counsel's characterization of the direction given by department managers as "routine." On redirect, she testified that by "routine" she meant a function undertaken daily.

underlings by margins of at least $1 to more than double. The produce manager receives an hourly wage four dollars greater than her single staff employee. The most recent night stock manager was paid hourly at a rate less than that of two subordinate employees.

All individuals receive the same holiday and vacation benefits, as well as the same health insurance, § 401(k) plan, and long-term disability plan. Salaried managers are eligible for bonus pay, while hourly workers may qualify for bonus hours. Certain fringe benefit plans, such as life insurance and short-term disability, vary depending upon whether the individual is salaried or hourly.

The store and assistant store directors occupy locking offices upstairs from the selling floor. Department managers work downstairs on the selling floor in their respective work areas and at desks. They are not given keys to the upstairs offices, nor do they have access to employees' personnel files, as store and assistant store directors do.

The supervisory indicia enumerated in Section 2(11) of the Act are read in the disjunctive, so that possession of any one of the listed authorities can invest the individual with supervisory status. ***Ohio Power Co. v. NLRB,*** 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). To separate straw bosses from true supervisors, the Act prescribes that the exercise of supervisory indicia be in the interest of the employer and require the use of independent judgment. This means that neither the discharge of Section 2(11) functions in a routine and clerical manner, nor the use of independent judgment to solve problems unrelated to Section 2(11) functions, qualifies as supervisory. ***Alois Box Co.,*** 326 NLRB 1177 (1998).

The burden of proof rests with the party seeking to exclude an individual as a supervisor. ***Benchmark Mechanical Contractors,*** 327 NLRB 829 (1999); ***Bennett Industries,*** 313 NLRB 1363 (1994). The Board is mindful not to deprive employees of their rights under Section 7 by interpreting the term supervisor too broadly. ***Unifirst Corp.,*** 335 NLRB No. 58, slip op. at 8 (Aug. 27, 2001) (JD). Job titles, or the lack of them, are not determinative. ***Davis Supermarkets,*** 306 NLRB 4266, 458 (1992), *enfd.* 2 F.3d 1162 (D.C. Cir. 1993), cert. denied 511 U.S. 1003 (1994).

The care taken to distinguish work leaders from genuine supervisors is evident in ***Azusa Ranch Market,*** 321 NLRB 811 (1996), a representation proceeding involving the status of two key carriers and a liquor manager. The evidence showed that those individuals gave employees daily work instructions, scheduled breaks every two hours based upon business needs, made job reassignments, sent employees home early and granted time-off requests, provided input into employees' progress, reported performance problems to management, and issued written warnings on their own. One served as the sole head of the store four evenings per week when the general manager was gone. The individuals were nonetheless found to be employees because their actions were those of experienced, trusted leaders and did not involve independent judgment. Similarly, a head cashier in ***Mack's Supermarkets,*** 288 NLRB 1082 (1988)who trained and scheduled other cashiers, received and acted upon time-off requests, and revised schedules to accommodate employees' leave, was deemed an employee due to the routine nature of her work.

While the department managers here have responsibility to schedule and act upon leave requests, they do so within relatively fixed parameters established by the Employer

regarding maximum labor hours and leave entitlements. This militates against a finding of independent judgment. ***Dico Tire,*** 330 NLRB No. 177, slip op. at 2 (Apr. 17, 2000). That most absence requests are approved also implies that the scope of discretion accorded to department managers is clerical. ***L. Suzio Concrete Co.,*** 325 NLRB 392, 398 (1998), *enfd.* 173 F.3d 844 (2nd Cir. 1999).

There is some evidence that department managers have successfully recommended employees for promotion. Those instances appear isolated, and it is unclear how dispositive the recommendations were of the outcome. The record is also uncertain as to how often or why department managers attend hiring interviews. In fact, no evidence of specific hiring recommendations was introduced, other than an account of Meat Manager Burnett having agreed to the hiring of an employee because another whom he favored was not available as soon. Consultation with Burnett regarding hiring and promotion, such as when to convert a meat department employee to journeyman meat-cutter status, reflects deference to Burnett's technical knowledge, not delegation of supervisory authority. ***Aardvark Post,*** 331 NLRB No. 41, slip op. at 2 (June 13, 2000).

The record does not permit a supervisory finding based upon certain department managers' participation in the pre-screening stage of the hiring process. Actual interviews are conducted and hiring decisions are made by store directors. Significantly, there is no evidence as to the grounds on which department managers may reject candidates. Pre-screening therefore may not be considered equivalent to a refusal to hire, or an effective recommendation to hire, devolving from the use of independent judgment. Rather, the role of pre-screeners appears to be a ministerial one of weeding out those obviously unqualified based on objective Employer standards.

***Operating Engineers Local 3,*** 324 NLRB 1183, 1187 (1997). Compare ***Fred Meyer Alaska,*** 334 NLRB No. 94, slip op. at 4 (July 19, 2001) (meat and seafood managers using independent judgment in hiring are supervisors).

The employee handbook's Fair Treatment Procedure implies that department managers have the authority to adjust employee grievances at the initial appeal level. This may impart supervisory status. ***Koronis Parts,*** 324 NLRB 675 (1997). However, the lack of any record evidence regarding how, if ever, this system is utilized makes this paper authority a tenuous basis for a supervisory finding.

Department managers instruct employees as to their daily tasks. However, as stated by the Fifth Circuit in ***NLRB v. Security Guard Service,*** 384 F.2d 143, 150 (5th Cir. 1967):

> If any authority over someone else, no matter how insignificant or infrequent, made an employee a supervisor, our industrial composite would be predominantly supervisory. Every order-giver is not a supervisor. Even the traffic director tells the president of a company where to park his car.

Like the Board in ***Azusa Ranch Market,*** *supra,* I find that the direction supplied by department managers is routine in nature. Although particular job assignments may vary from day to day, choosing them demands a department manager's adherence to normal retail and prescribed store procedures, not the use of independent judgment as contemplated by Congress.

When performance evaluations are linked to pay raises, the authority to complete them constitutes an effective recommendation for a wage increase and thus satisfies a

statutory supervisory indicium. ***Bethany Medical Center,*** 328 NLRB No. 161 (Aug. 3, 1999); ***El-Tech Research Corp.,*** 300 NLRB 522 (1990). When the evaluation is not a direct or systematic element of a wage decision, the evaluator is not a supervisor. ***Hausner Hard-Chrome of Kentucky,*** 326 NLRB 426, 427 (1998). Factors affecting the analysis include how frequently the evaluator's rating is modified by upper management, whether the evaluation is a collaborative process, the weight given to the evaluator's judgments, and whether performance considerations other than those reflected in the evaluation are taken into account. ***Ten Broeck Commons,*** 320 NLRB 806, 813 (1996).

I find that the evaluations regularly issued by Customer Services Manager Pratt, Meat Manager Burnett, Deli Manager Doran, Bakery Manager Kovachevich, and Produce Manager Toppi are sufficient to render them supervisors. They complete the forms on their own. Their ratings are seldom disturbed. Although upper-level management decides the financial value of each overall rating, the independent assessment of an individual employee's progress and performance rendered by the department managers just noted determines how the employee will fare under the given reward system. An evaluation program almost identical to the one at issue was the basis of a supervisory finding in ***Bayou Manor Health Center,*** 311 NLRB 955 (1993). A similar program yielded a like result in ***Harbor City Volunteer Ambulance Squad,*** 318 NLRB 764 (1995).[12]

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[12] This conclusion makes moot a discussion of whether these department managers are supervisors on the additional basis of their authority to issue lower-level discipline. Ideally, the record would have been more complete in this regard by disclosing what reliance is given by the store director, when making suspension and discharge decisions, upon any prior record of counseling and

For most of his work hours, Grocery Manager Jay McGuire oversees one employee. Although supervisory status may be found based upon supervision of only one employee, ***American Crane Corp.,*** 326 NLRB 1401, 1404 (1998); ***Jack Holland & Son,*** 237 NLRB 263, 265 (1978), McGuire does not evaluate or schedule that employee or any other. There is no specific evidence that McGuire disciplines employees. The Employer notes that the grocery manager is responsible for the area of the store that accounts for almost one-half of all sales.

The Employer urges that McGuire is a supervisor in part because of his participation in pre-screening job applications and his direction of the night crew. For the reasons stated above, I find neither argument persuasive of supervisory status. Nor are his attendance at management meetings, choice of salaried status, and eligibility for the salaried bonus plan sufficient bases alone. ***General Security Services,*** 326 NLRB 312 (1998), *enfd.* 187 F.3d 629 (8th Cir. 1999) (secondary indicia of supervisory status not dispositive); ***Juniper Industries,*** 311 NLRB 109, 110 (1993) (same).

The Employer argues also that McGuire is a supervisor because he is the "person-in-charge" of the entire store about twice weekly, usually from 5:00 p.m. to 10:00 p.m., when higher-level management and most other department managers have left for the evening. McGuire's service as the person-in-charge ends at 10:00 p.m. when the assistant store director substituting for the night stock manager arrives. The record

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prompters issued by the employee's department manager. ***Passavant Health Center,*** 284 NLRB 887, 889 (1987) (reportorial and didactic function of claimed supervisor does not amount to statutory supervision).

suggests that other department managers may, and Customer Services Manager Mary Pratt regularly does, accompany McGuire at work for a couple of hours between 5:00 p.m. and 10:00 p.m. No extra remuneration is paid McGuire as the person-in-charge.

Even if McGuire is the only on-site official for a limited period from time to time, taking charge does not necessarily imply supervisory authority. First, the Act demands that supervisory substitution be more than sporadic. ***Aladdin Hotel,*** 270 NLRB 838 (1984). Second, the Act requires proof that the individual is authorized while in charge to use independent judgment in carrying out at least one of the statutory supervisor indicia. Many grocery store cases illustrate the latter point. In ***Azusa Ranch Market,*** *supra,* a putative supervisor was denied that status even though he was the highest on-site individual four nights every week. A produce manager who was solely in charge twice weekly was also not deemed a supervisor. ***Smitty's Foods,*** 201 NLRB 283, 285-286 (1973). Even grocery department managers left in charge several hours every evening were not classified as statutory supervisors. ***Foote's Dixie Dandy,*** 223 NLRB 1363 (1976).

Store Director Gonzler testified that McGuire is expected to handle all problems that arise when he is in charge. The only example Gonzler mentioned was McGuire's instructing an employee to perform the routine task of replenishing milk shelves. Gonzler cited employee injury, theft, and customer altercation as events that *could* occur on McGuire's watch. However, the ideas remained defectively speculative; no evidence was adduced to illustrate McGuire's actual handling of those or like problems as the person-in-charge. ***General Security Services,*** *supra* (responses to how hypothetical problems might be handled is not enough to establish

supervisory status). Nor does the record suggest in general terms how unilaterally or independently McGuire may act while serving as person-in-charge. For instance, it is unknown whether he would deal with a crisis by telephoning or summoning Gonzler or an assistant store director or how final his personnel decisions as person-in-charge would be.

The state of the record precludes a determination at this point of McGuire's supervisory status based upon his twice-weekly stints as person-in-charge. He may therefore vote under challenge.

When the position is filled, the night stock manager is responsible for a crew of seven workers from about 10:00 p.m. to 7:00 a.m., during which time no other manager is present. The night stock manager does not evaluate or schedule employees, nor is there evidence that he is empowered to discipline them. To the extent that the Employer contends that the night stock manager is a supervisor by virtue of being in charge overnight, the same evidentiary infirmities discussed above in connection with Grocery Manager McGuire apply. Virtually all of the other bases urged by the Employer for considering the night stock manager to be a supervisor have been rejected. The person who most recently occupied the position earned less than two of his underlings. I find that the Employer has not met its burden to prove that the night stock manager job is supervisory.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time clerks, cashiers, meat cutters, department specialists, and courtesy clerks employed by the Employer at its facility located at 5463 North Huron Road, Oscoda, Michigan; but excluding store director, assistant store directors, customer services manager, meat manager, deli manager, bakery manager, produce manager, managers in training, seasonal employees, and guards and supervisors as defined in the Act.

Those eligible shall vote as set forth in the attached Direction of Election.

Dated at Detroit, Michigan, this 19th day of December, 2001.

(SEAL) /s/

William C. Schaub, Jr., Regional Director
National Labor Relations Board,
Seventh Region
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226

## DIRECTION OF ELECTION

An election by secret ballot shall be conducted under the direction and supervision of the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those employees in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

LOCAL 876, UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, AFL-CIO

## LIST OF VOTERS[13]

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. ***Excelsior Underwear, Inc.,*** 156 NLRB 1236 (1966); ***NLRB v. Wyman-Gordon Company,*** 394 U.S. 759 (1969); ***North Macon Health Care Facility,*** 315 NLRB 359 (1994). Accordingly, it is hereby directed that **within 7 days** of the date of this Decision, **2** copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. The list must be of sufficient clarity to be clearly legible. The list may be submitted by facsimile transmission, in which case only one copy need be submitted. In order to be timely filed, such list must be received in the **DETROIT REGIONAL OFFICE** on or before **December 26, 2001.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

## RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court, 1099**

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[13] If the election involves professional and nonprofessional employees, it is requested that separate lists be submitted for each voting group.

**14th Street NW, Washington D.C. 20570.** This request must be received by the Board in Washington by: **January 2, 2002.**

**Section 103.20 of the Board's Rule concerns the posting of election notices. Your attention is directed to the attached copy of that Section.**

## APPENDIX K

## TITLE 29. LABOR
## CHAPTER 7. LABOR-MANAGEMENT RELATIONS
## NATIONAL LABOR RELATIONS

### 29 U.S.C. § 152. Definitions

When used in this Act [29 USCS §§ 151-158, 159-168]--

* * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

### 29 U.S.C. § 157. Rights of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization

as a condition of employment as authorized in section 8(a)(3) [29 USCS § 158(a)(3)].

**29 U.S.C. § 158. Unfair labor practices**

(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 USCS § 157];

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [29 USCS § 156], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in section 8(a) of this Act [this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (I) if such labor organization is the representative of the employees as provided in section 9(a) [29 USCS § 159(a)], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless

following an election held as provided in section 9(e) [29 USCS § 159(e)] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [29 USCS § 159(a)].

* * * * *

(c) Expression of views without threat of reprisal or force or promise of benefit. The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

**29 U.S.C. § 159. Representatives and elections**

(a) Exclusive representatives; employees' adjustment of grievances directly with employer. Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) Determination of bargaining unit by Board. The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act [29 USCS §§ 151-158, 159-169], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3)

decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) Hearings on questions affecting commerce; rules and regulations.

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (I) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsec. (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsec. (a) of this section];-or
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsec. (a) of this section];

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [29 USCS § 160(c)].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [29 USCS §§ 151-158, 159-169] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballots receives a majority, a runoff shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Petition for enforcement or review; transcript. Whenever an order of the Board made pursuant to section 10(c) [29 USCS § 160(c)], is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) [29 USCS § 160(e) or (f)], and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part of the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) Secret ballot; limitation of elections.

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3) [29 USCS § 158(a)(3)], of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

**TITLE 29 -- LABOR**
**SUBTITLE B -- REGULATIONS RELATING TO LABOR**
**CHAPTER I -- NATIONAL LABOR RELATIONS BOARD**
**PART 102 -- RULES AND REGULATIONS**
**SUBPART C -- PROCEDURE UNDER SECTION 9(c) OF THE ACT FOR THE DETERMINATION OF QUESTIONS CONCERNING REPRESENTATION OF EMPLOYEES H3 AND FOR CLARIFICATION OF BARGAINING UNITS AND FOR AMENDMENT OF CERTIFICATIONS UNDER SECTION 9(B) OF THE ACT**

**29 C.F.R. § 102.67 Proceedings before the regional director; further hearing; briefs; action by the regional director; appeals from action by the regional director; statement in opposition to appeal; transfer of case to the Board; proceedings before the Board; Board action.**

(a) The regional director may proceed, either forthwith upon the record or after oral argument, the submission of briefs, or further hearing, as he may deem proper, to determine the unit appropriate for the purpose of collective bargaining, to determine whether a question concerning representation exists, and to direct an election, dismiss the petition, or make other disposition of the matter. Any party desiring to submit a brief to the regional director shall file the original and one copy thereof, which may be a typed carbon copy, within 7 days after the close of the hearing: Provided,

however, That prior to the close of the hearing and for good cause the hearing officer may grant an extension of time not to exceed an additional 14 days. Copies of the brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the regional director together with the brief. No reply brief may be filed except upon special leave of the regional director.

(b) A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be final: Provided, however, That within 14 days after service thereof any party may file a request for review with the Board in Washington, DC. The regional director shall schedule and conduct any election directed by the decision notwithstanding that a request for review has been filed with or granted by the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of the election or any action taken or directed by the regional director: Provided, however, That if a pending request for review has not been ruled upon or has been granted ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision.

(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(d) Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity or recourse to the record; however, the Board may, in its discretion, examine the record in evaluating the request. With respect to ground (2), and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the regional director.

(e) Any party may, within 7 days after the last day on which the request for review must be filed, file with the Board a statement in opposition thereto, which shall be served in accordance with the requirements of paragraph (k) of this section. A statement of such service of opposition shall be filed simultaneously with the Board. The Board may deny the request for review without awaiting a statement in opposition thereto.

(f) The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair

labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

(g) The granting of a request for review shall not stay the regional director's decision unless otherwise ordered by the Board. Except where the Board rules upon the issues on review in the order granting review, the appellants and other parties may, within 14 days after issuance of an order granting review, file briefs with the Board. Such briefs may be reproductions of those previously filed with the regional director and/or other briefs which shall be limited to the issues raised in the request for review. Where review has been granted, the Board will consider the entire record in the light of the grounds relied on for review. Any request for review may be withdrawn with the permission of the Board at any time prior to the issuance of the decision of the Board thereon.

(h) In any case in which it appears to the regional director that the proceeding raises questions which should be decided by the Board, he may, at any time, issue an order, to be effective after the close of the hearing and before decision, transferring the case to the Board for decision. Such an order may be served on the parties upon the record of the hearing.

(i) If any case is transferred to the Board for decision after the parties have filed briefs with the regional director, the parties may, within such time after service of the order transferring the case as is fixed by the regional director, file with the Board the brief previously filed with the regional director. No further briefs shall be permitted except by special

permission of the Board. If the case is transferred to the Board before the time expires for the filing of briefs with the regional director and before the parties have filed briefs, such briefs shall be filed as set forth above and served in accordance with the requirements of paragraph (k) of this section within the time set by the regional director. If the order transferring the case is served on the parties during the hearing, the hearing officer may, prior to the close of the hearing and for good cause, grant an extension of time within which to file a brief with the Board for a period not to exceed an additional 14 days. No reply brief may be filed except upon special leave of the Board.

(j) Upon transfer of the case to the Board, the Board shall proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing, as it may determine, to decide the issues referred to it or to review the decision of the regional director and shall direct a secret ballot of the employees or the appropriate action to be taken on impounded ballots of an election already conducted, dismiss the petition, affirm or reverse the regional director's order in whole or in part, or make such other disposition of the matter as it deems appropriate.

(k)(1) All documents filed with the Board under the provisions of this section shall be filed in eight copies, double spaced, on 8 ½ - by 11-inch paper, and shall be printed or otherwise legibly duplicated. Carbon copies of typewritten materials will not be accepted. Requests for review, including briefs in support thereof; statements in opposition thereto; and briefs on review shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the Board by motion, setting forth the reasons therefor, filed not less than 5 days, including Saturdays, Sundays, and holidays,

prior to the date the document is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page authorities cited.

(2) The party filing with the Board a request for review, a statement in opposition to a request for review, or a brief on review shall serve a copy thereof on the other parties and shall file a copy with the regional director. A statement of such service shall be filed with the Board together with the document.

(3) Requests for extensions of time to file requests for review, statements in opposition to a request for review, or briefs, as permitted by this section, shall be filed with the Board or the Regional Director, as the case may be. The party filing the request for an extension of time shall serve a copy thereof on the other parties and, if filed with the Board, on the Regional Director. A statement of such service shall be filed with the document.

**29 C.F.R. § 102.69 Election procedure; tally of ballots; objections; certification by the regional director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing.**

(a) Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the Regional Director in whose Region the proceeding is pending. All elections shall be by secret ballot. Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompt request to and approval thereof by the Regional Director, whose decision shall be final, have its name removed from the ballot: Provided, however, That in a proceeding involving an employer-filed petition or a petition for decertification the

labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties and the Regional Director, disclaiming any representation interest among the employees in the unit. Any party may be represented by observers of its own selection, subject to such limitations as the Regional Director may prescribe. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election the ballots will be counted and a tally of ballots prepared and immediately made available to the parties. Within 7 days after the tally of ballots has been prepared, any party may file with the Regional Director an original and five copies of objections to the conduct of the election or to conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. A person filing objections by facsimile pursuant to § 102.114(f) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing by facsimile, if otherwise proper. In addition, extra copies need not be filed if the filing is by facsimile pursuant to § 102.114(f). The Regional Director will cause a copy of the objections to be served on each of the other parties to the proceeding. Within 7 days after the filing of objections, or such additional time as the Regional Director may allow, the party filing objections shall furnish to the Regional Director the evidence available to it to support the objections.

(b) If no objections are filed within the time set forth above, if the challenged ballots are insufficient in number to affect the results of the election, and if no runoff election is to be held pursuant to § 102.70, the regional director shall

forthwith issue to the parties a certification of the results of the election, including certification of representative where appropriate, with the same force and effect as if issued by the Board, and the proceeding will thereupon be closed.

(c)(1) If timely objections are filed to the conduct of the election or to conduct affecting the results of the election, or if the challenged ballots are sufficient in number to affect the results of the election, the regional director shall, consistent with the provisions of § 102.69(d), initiate an investigation, as required, of such objections or challenges.

(2) If a consent election has been held pursuant to § 102.62(b), the regional director shall prepare and cause to be served on the parties a report on challenged ballots or on objections, or on both, including his recommendations, which report, together with the tally of ballots, he shall forward to the Board in Washington, DC. Within 14 days from the date of issuance of the report on challenged ballots or on objections, or on both, any party may file with the Board in Washington, DC, exceptions to such report, with supporting documents as permitted by § 102.69(g)(3) and/or a supporting brief if desired. Within 7 days from the last date on which exceptions and any supporting documents and/or supporting brief may be filed, or such further period as the Board may allow, a party opposing the exceptions may file an answering brief, with supporting documents as permitted by § 102.69(g)(3) if desired, with the Board in Washington, DC. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. The report on challenged ballots may be consolidated with the report on objections in appropriate cases.

(3) If the election has been conducted pursuant to a direction of election issued following any proceeding under § 102.67, the regional director may (I) issue a report on objections or on challenged ballots, or on both, as in the case of a consent election pursuant to paragraph (b) of § 102.62, or (ii) exercise his authority to decide the case and issue a decision disposing of the issues, and directing appropriate action or certifying the results of the election.

(4) If the regional director issues a report on objections and challenges, the parties shall have the rights set forth in paragraph (c)(2) of this section and in § 102.69(f); if the regional director issues a decision, the parties shall have the rights set forth in § 102.67 to the extent consistent herewith, including the right to submit documents supporting the request for review or opposition thereto as permitted by § 102.69(g)(3).

(d) In issuing a report on objections or challenged ballots, or both, following proceedings under §§ 102.62(b) or 102.67, or in issuing a decision on objections or challenged ballots, or both, following proceedings under § 102.67, the regional director may act on the basis of an administrative investigation or upon the record of a hearing before a hearing officer. Such hearing shall be conducted with respect to those objections or challenges which the regional director concludes raise substantial and material factual issues.

(e) Any hearing pursuant to this section shall be conducted in accordance with the provisions of §§ 102.64, 102.65, and 102.66, insofar as applicable, except that, upon the close of such hearing, the hearing officer shall, if directed by the regional director, prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the

disposition of the issues. In any case in which the regional director has directed that a report be prepared and served, any party may, within 14 days from the date of issuance of such report, file with the regional director the original and one copy, which may be a carbon copy, of exceptions to such report, with supporting brief if desired. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the regional director. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the regional director may allow, a party opposing the exceptions may file an answering brief with the regional director. An original and one copy, which may be a carbon copy, shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the regional director. If no exceptions are filed to such report, the regional director, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

(f) In a case involving a consent election held pursuant to § 102.62(b), if exceptions are filed, either to the report on challenged ballots or on objections, or on both if it be a consolidated report, and it appears to the Board that such exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record or may make other disposition of the case. If it appears to the Board that such exceptions raise substantial and material factual issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served on the parties a notice of hearing on said exceptions before a hearing officer. The hearing shall be conducted in accordance with the provisions of §§ 102.64, 102.65, and 102.66 insofar as

applicable. Upon the close of the hearing the agent conducting the hearing, if directed by the Board, shall prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations to the Board as to the disposition of the challenges or objections, or both if it be a consolidated report. In any case in which the Board has directed that a report be prepared and served, any party may within 14 days from the date of issuance of the report on challenged ballots or on objections, or on both, file with the Board in Washington, DC., exceptions to such report, with supporting brief if desired. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further period as the Board may allow, a party opposing the exceptions may file an answering brief with the Board in Washington, DC. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. The Board shall thereupon proceed pursuant to § 102.67: Provided, however, That in any with an unfair labor practice case for purposes of hearing the provisions of § 102.46 of thes rules shall govern with respect to the filing of exceptions or an answering brief to the exceptions to the administrative law judge's decision.

(g)(1)(i) In a proceeding pursuant to this section in which a hearing is held, the record in the case shall consist of the notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exhibits, together with the objections to the conduct of the election or to conduct affecting the results of the election, any report on such objections, any report on challenged ballots, exceptions to any such report, any briefs or other legal memoranda submitted by the parties, the decision of the regional director, if any, and the record previously made as defined in § 102.68. Materials

other than those set out above shall not be a part of the record.

(ii) In a proceeding pursuant to this section in which no hearing is held, the record shall consist of the objections to the conduct of the election or to conduct affecting the results of the election, any report on objections or on challenged ballots and any exceptions to such a report, any regional director's decision on objections or challenged ballots and any request for review of such a decision, any documentary evidence, excluding statements of witnesses, relied upon by the regional director in his decision or report, any briefs or other legal memoranda submitted by the parties, and any other motions, rulings or orders of the regional director. Materials other than those set out above shall not be a part of the record, except as provided in paragraph (g)(3) of this section.

(2) Immediately upon issuance of a report on objections or challenges, or both, upon issuance by the regional director of an order transferring the case to the Board, or upon issuance of an order granting a request for review by the Board, the regional director shall transmit to the Board the record of the proceeding as defined in paragraph (g)(1) of this section.

(3) In a proceeding pursuant to this section in which no hearing is held, a party filing exceptions to a regional director's report on objections or challenges, a request for review of a regional director's decision on objections or challenges, or any opposition thereto, may support its submission to the Board by appending thereto copies of documentary evidence, including copies of any affidavits, it has timely submitted to the regional director and which were not included in the report or decision. Documentary evidence

so appended shall there upon become part of the record in the proceeding. Failure to timely submit such documentary evidence to the regional director, or to append that evidence to its submission to the Board in the representation proceeding as provided above, shall preclude a party from replying on such evidence in any subsequent related unfair labor proceeding.

(h) In any such case in which the regional director or the Board, upon a ruling on challenged ballots, has directed that such ballots be opened and counted and a revised tally of ballots issued, and no objection to such revised tally is filed by any party within 7 days after the revised tally of ballots has been made available, the regional director shall forthwith issue to the parties certification of the results of the election, including certifications of representative where appropriate, with the same force and effect as if issued by the Board. The proceeding shall thereupon be closed.

(i)(1) The action of the regional director in issuing a notice of hearing on objections or challenged ballots, or both, following proceedings under § 102.62(b) shall constitute a transfer of the case to the Board, and the provisions of § 102.65(c) shall apply with respect to special permission to appeal to the Board from any such direction of hearing.

(2) Exceptions, if any, to the hearing officer's report or to the administrative law judge's decision, and any answering brief to such exceptions, shall be filed with the Board in Washington, DC, in accordance with paragraph (f) of this section.

(j)(1) All documents filed with the Board under the provisions of this section shall be filed in eight copies, double spaced, on 8 ½ - by 11-inch paper, and shall be printed or

otherwise legibly duplicated. Carbon copies of typewritten materials will not be accepted. Briefs in support of exceptions or answering briefs shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the Board by motion, setting forth the reasons therefor, filed not less than 5 days, including Saturdays, Sundays, and holidays, prior to the date the brief is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited.

(2) The party filing with the Board exceptions to a report, a supporting brief, or an answering brief shall serve a copy thereof on the other parties and shall file a copy with the regional director. A statement of such service shall be filed with the Board together with the document.

(3) Requests for extensions of time to file exceptions to a report, supporting briefs, or answering briefs, as permitted by this section, shall be filed with the Board on the Regional Director, as the case may be. The party filing the request for an extension of time shall serve a copy thereof on the other parties and, if filed with the Board, or the Regional Director. A statement of such service shall be filed with the document.

## UNITED STATES COURT OF APPEALS
## FOR THE SIXTH CIRCUIT
### Cir. R. 200. Administrative Rules

### Cir. R. 206. Publication of Decisions

(a) Criteria for Publication. The following criteria shall be considered by panels in determining whether a decision will be designated for publication in the Federal Reporter:

(1) whether it establishes a new rule of law, or alters or modifies an existing rule of law, or applies an established rule to a novel fact situation;

(2) whether it creates or resolves a conflict or authority either within the circuit or between this circuit and another;

(3) whether it discusses a legal or factual issue of continuing public interest;

(4) whether it is accompanied by a concurring or dissenting opinion;

(5) whether it reverses the decision below, unless:

(A) the reversal is caused by an intervening change in law or fact, or,

(B) the reversal is a remand (without further comment) to the district court of a case reversed or remanded by the Supreme Court;

(6) whether it addresses a lower court or administrative agency decision that has been published; or,

(7) whether it is a decision that has been reviewed by the United States Supreme Court.

(b) Designation for Publication. An opinion or order shall be designated for publication upon the request of any member of the panel.

(c) Published Opinions Binding. Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published opinion of the court.

## TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
## PART V. PROCEDURE
## CHAPTER 131. RULES OF COURTS

### 28 U.S.C. § 2071. Rule-making power generally

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title [28 USCS § 2072].

## FEDERAL RULES OF APPELLATE PROCEDURE
## VII. GENERAL PROVISIONS

### Fed. R. App. P. 47. Local Rules by Courts of Appeals

(a) Local Rules.

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules

governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with -- but not duplicative of -- Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

## APPENDIX L

November 6, 2006

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540 Potter Stewart U.S. Courthouse
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Re: Nos. 05-2378, 05-2461 - NLRB v. Family Fare, Inc. Board Case No. 7-CA-48457

Dear Mr. Green:

This law firm represents Respondent Family Fare, Inc. in the above-referenced case. A panel of the Sixth Circuit, including Judges Siler, Clay, and Stafford, heard oral argument on September 21, 2006. This letter is written pursuant to Federal Rule of Appellate Procedure 28(j).

In our initial brief at pages 6, 22, 38 and 39, and in our reply brief at pages 21, 22, and 25 to the Court, we cited *SNE Enterprises, Inc.*, 344 NLRB No. 81 (2005). In that decision, the NLRB remanded the case to the Regional Director for reconsideration of "the supervisors' pro-union activity, including but not limited to whether their solicitation of authorization cards constitute[d] objectionable conduct." *Id.* at * 1.

On October 31, 2006, the NLRB issued a subsequent decision. *SNE Enterprises,* 348 NLRB No. 69 (2006); 2006 WL 3146784. Respondent became aware of this new decision on November 6, 2006. In this new decision, the NLRB addressed several issues important to our case. Among them are: how the inherent tendency of supervisory union card solicitation interferes with employee rights to a free and fair election *(id.* at *2); what evidence is sufficient to establish that supervisors were acting as "conduits" for the collection and return of union cards *(id.* at n.5); and how an employer's actions taken to disavow conduct of pro-union supervisors may not remove the taint *(id. at* *5).

We respectfully ask that you advise the panel who heard our case of this new NLRB decision in *SNE Enterprises* by

circulating a copy of this letter to each of them. Thank you for your consideration.

Sincerely,

MILLER JOHNSON

/s/_____
Brent D. Rector

BDR/kee
cc: Richard A. Cohen